

\$5,000, the fee for stations in Remaining Markets (i.e., those below the top 100). [Licensee] also seeks a waiver to the extent deemed necessary ... to grant the requested reduction,"<sup>3</sup> and because Licensee paid the higher fee, it seeks refund of the \$25,525 difference.

In support of its position, Licensee refers to a 1995 Memorandum Opinion and Order and 1996 Report and Order that explained the standards at the time in reviewing a request for a reduction in fee<sup>4</sup> and the standard set forth at 47 C.F.R. § 1.1166 that requires a showing of good cause and that the reduction would serve the public interest.<sup>5</sup> Licensee asserts it established good cause by showing certain features of KUPT's signal<sup>6</sup> and that the "2016 edition of the Television & Cable Factbook show[] KUPT operates as a satellite of KUPT-LD, Albuquerque [sic]"<sup>7</sup> but it does not pay a satellite station regulatory fee.<sup>8</sup> Next, Licensee asserts the public interest is served, in part, because "a small station like KUPT cannot equitably be saddled with top 50 market regulatory fees that fail to take into account its inferior competitive and technical status within the larger market. In-market disparities are only exacerbated when comparable competitors ... pay only very low satellite regulatory fees."<sup>9</sup> Licensee acknowledges its "carriage by certain cable systems" and "satellite carriage within the DMA"<sup>10</sup> but asserts that situation "does not place the station on par with stations that directly serve the major population centers over the air," and the factor is not dispositive because, in Licensee's view, in 1995, the Commission did not assign the amount of weight given to cable carriage and, the "primary focus in the 1995 and 1996 rulings [was] on the relative over the air coverage." Furthermore, Licensee acknowledges its network affiliation with "the fledgling Heroes and Icons TV network," but asserts the "affiliation is of marginal relevance"<sup>11</sup> with the explanation "there is a substantial and material difference between a major network affiliation of that kind prevalent in 1995 (ABC, CBS, FOX, and NBC) and affiliation with a far less widely viewed network of today like Heroes and Icons TV."<sup>12</sup> Hence, in Licensee's view, its station is "on a par with stations in the

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<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 2; Implementation of Section 9 of the Communications Act and Assessment and Collection of Regulatory Fees of the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12763 ¶ 21 (1995) (Applicants considered for relief "were generally UHF stations ... lack[ing] network affiliations ... located outside of the principle city's metropolitan area and do not provide a Grade B signal to a substantial portion of the market's metropolitan areas. Often these stations are not carried by cable systems serving the principal metropolitan areas."); Assessment and Collection of Regulatory Fees for Fiscal Year 1996, Report and Order, 11 FCC Rcd 18774, 18786 ¶ 32 (1996) ("We ... rely on Nielsen's DMA market rankings ... Nielsen data is generally accepted throughout the industry and will be updated and published annually ... We will consider the equities concerning the fees of licensees that change markets on a case-by-case basis, upon request, and, where a licensee demonstrates that it does not serve its assigned market, we will consider reducing the assigned fees to a more equitable level, based upon the area actually served by the licensee.").

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* Licensee acknowledges its Nielsen DMA, and asserts over-the-air viewing is "particularly important to a station's chance of success" and that the station's "over the air signal reaches comparatively few viewers." Licensee refers to the *Engineering Statement* as demonstrating the "relevant digital noise-limited service [station] contour" covers 53,077 viewers.

<sup>7</sup> Licensee does not explain the ambiguity resulting from this assertion of its claimed satellite status and the information at Licensee's Exhibit 3 that purports to show station KUPT is a satellite of KMYL-LD, Lubbock, TX.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> Licensee asserts it receives satellite carriage within the DMA (Request at 6, n. 19), but it fails to explain in greater detail the resulting viewership.

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* 6-7.

Remaining Markets ... decidedly *not* with the considerably more powerful stations that broadcast their signals and major network programming to the ... population centers in an around Albuquerque.”<sup>13</sup>

Prior to filing this *Request*, Licensee submitted several email messages, letters, and a Petition for Reconsideration (*Petition*) seeking to alter Licensee’s fee status to that of a satellite television station,<sup>14</sup> but without first obtaining a “formal Rule 73.3555 Note 5 ‘satellite station waiver’ of the FCC’s duopoly rules.”<sup>15</sup> We dismissed Licensee’s *Petition* for several separate reasons, *e.g.*, it was not filed with the Commission,<sup>16</sup> Licensee combined requests requiring action by different bureaus and offices,<sup>17</sup> Licensee was delinquent in paying debts owed to the

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<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 1. See *e.g.*, Email from Dennis P. Corbett ([DCorbett@lermansenter.com](mailto:DCorbett@lermansenter.com)) to ARINQUIRIES (Nov. 24, 2014) (2014 Request I) with Attachment A, Advanced TV Factbook Listing for KUPT (TV), Attachment B, BIA Listing for KUPT (TV); email from Dennis P. Corbett ([DCorbett@lermansenter.com](mailto:DCorbett@lermansenter.com)) to ARINQUIRIES (Nov. 24, 2014) (2014 Request II) with Attachment A, Advanced TV Factbook Listing for KETL-TV, Nielsen TV Station Circulation, BIA Kelsey TV Analysis Report; Letter from Dennis P. Corbett, Lerman Senter, PLLC, 2000 K Street, N.W., Suite 600, Washington, DC 20006-1809 to Department of the Treasury, Debt Management Services, Post Office Box 830794, Birmingham, AL 35283-0794 (Mar. 17, 2016) (*Letter*) with attachments (A) letter from Department of the Treasury, Bureau of the Fiscal Service, P.O. Box 830794, Birmingham, AL 35283-0794 to Ramar Communications Inc., 2000 K Street, NW, Suite 600, Washington, DC 20006 (Feb. 22, 2016) (*Feb. 22, 2016, Treasury Demand*) and (B) email from Corbett, Dennis P. to ARINQUIRIES, FCC Washington, DC (Mar. 7, 2016) (*Email*) with summary of correspondence (*Summary*) and copy of *Feb. 22, 2016, Treasury Demand*; Letter from Dennis P. Corbett, Lerman Senter, PLLC, 2001 L Street NW, Suite 400, Washington, DC 20036 to Pioneer Credit Recovery, Inc., 26 Edward St., Arcade, NY 14009 (Jun. 29, 2016) (*Letter II*) with Attachment A, Letter from Pioneer Credit Recovery, Inc., 26 Edward St., Arcade, NY 14009 to Ramar Communications, Atty Dennis P Corbett, 2000 K St., NW, Ste 600, Washington, DC 20006 (Jun. 2, 2016), email from Corbett, Dennis P. to ARINQUIRIES, FCC Washington, DC (Mar. 7, 2016) (*Email*) with summary of correspondence (*Summary*) and copy of *Feb. 22, 2016, Treasury Demand*.

<sup>15</sup> Email from Berman, Laura M. [[LBerman@lermansenter.com](mailto:LBerman@lermansenter.com)] to ARINQUIRIES (Jun. 22, 2016), with Petition for Reconsideration of Regulatory Fee Demand Letter and Request for Refund of Regulatory Fees, KTEL-TV, Carlsbad, NM (Facility ID No. 83707), *Petition for Reconsideration and Request for Refund of Regulatory Fees*, To Office of the Managing Director (Jun. 22, 2016) (*Petition*) at 3, with Exhibit 1, Demand Letter from FCC, Washington, DC 20554 to Ramar Communications, Inc., 2001 L Street, NW, Suite 400, Washington, DC 20036 (Jun. 7, 2016) (*Jun. 2016 Demand Letter*), FCC, Remittance Advice Bill for Collection, Copy of Transfer of Funds Receipt (6/22/2016); Exhibit 2, Email from Mooradian, Jeffrey C. to ARINQUIRIES [[ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov)] (Oct 22, 2015) with attachments, email from Corbett, Dennis P. to ARINQUIRIES@FCC.GOV (Nov. 24, 2014) (2014 Request I) with Attachment A, Advanced TV Factbook Listing for KTEL-TV, Nielsen TV Station Circulation, BIA Kelsey TV Analysis Report, email from Corbett, Dennis P. to ARINQUIRIES@FCC.GOV (Nov. 24, 2014) (2014 Request II) with Attachment A, Advanced TV Factbook Listing for KUPT, Nielsen TV Station Circulation, BIA Kelsey TV Analysis Report; Exhibit 3, Email from Mooradian, Jeffrey C. to ARINQUIRIES [[ARINQUIRIES@FCC.GOV](mailto:ARINQUIRIES@FCC.GOV)] (Feb. 24, 2016) with FCC, Remittance Advice, Bill for Collection, email from Corbett, Dennis P. to ARINQUIRIES@FCC.GOV, (Nov. 24, 2014) (*duplicate of 2014 Request II*) with Attachment A, Advanced TV Factbook Listing for KUPT, Nielsen TV Station Circulation, BIA Kelsey TV Analysis Report; Exhibit 4, email from Corbett, Dennis P. to ARINQUIRIES@FCC.GOV (Mar. 7, 2016) (*Email*) with summary of correspondence (*Summary*) and copy of *Feb. 22, 2016, Treasury Demand*.

<sup>16</sup> 47 C.F.R. §§ 1.106(i) & (p), 1.1159(b), and 1.1167(b)(“Petitions for reconsideration and applications for review not accompanied by a fee payment should be filed with the Commission's Secretary and clearly marked to the attention of the Managing Director.”).

<sup>17</sup> 47 C.F.R. § 1.44(d).

Commission,<sup>18</sup> and the *Petition* was moot. In the alternative, on separate grounds, we denied the *Petition* because it did not warrant consideration by the Managing Director,<sup>19</sup> and Licensee failed to establish grounds for a refund.<sup>20</sup>

The Commission's records show that Licensee is delinquent in paying regulatory fees.

### *Standards*

The Commission's orders and rules include well-established procedures for assessing and collecting annual regulatory fees, and procedures for filing applications at the Commission including, for example, petitions for declaratory relief, petitions to defer, waive, reduce, or refund a payment, petitions for reconsideration, and other matters seeking Commission action, and the consequences when a licensee fails to comply.<sup>21</sup>

Relevant to television station regulatory fees, a television licensee is subject to the regulatory fee payment required for its class of station and market unless the station is a commonly owned television satellite station, authorized pursuant to Note 5 of 47 C.F.R. § 73.3555, that retransmits programming of the primary station.<sup>22</sup> A television satellite station is a full power terrestrial broadcast station authorized under Part 73 of the Commission's rules to retransmit all or part of the programming of a parent station that is ordinarily commonly owned.<sup>23</sup> Licensees are expected to know these rules and procedures,<sup>24</sup> and the consequences for non-compliance including debt collection procedures. In that regard, a debt is "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency."<sup>25</sup>

In the 1994 *MO&O*, the Commission discussed then-relevant circumstances upon which a licensee may apply for a reduction of its regulatory fee. Specifically, the Commission opined that a licensee of a UHF station, lacking network affiliation, operating in a large market, not providing a signal to a substantial portion of DMA, and not carried by cable systems serving the DMA principal metropolitan areas, may apply to the Managing Director for a reduction of the

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<sup>18</sup> 47 C.F.R. § 1.1164(e), 1.1167(b) ("filing of a petition for reconsideration ... of a fee determination will not relieve licensees from the requirement that full and proper payment of the underlying fee payment be submitted, as required by the Commission's action, or delegated action, on a request for waiver, reduction or deferment.")

<sup>19</sup> 47 C.F.R. § 1.106(p).

<sup>20</sup> 47 C.F.R. § 1.1160.

<sup>21</sup> See 47 C.F.R. Part 1, e.g., Subparts A, G, and O, 47 C.F.R. §§ 1.2, 1.43, 1.44, 1.106, 1.1153, 1.1157, 1.1164, 1.1166.

<sup>22</sup> Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 F.C.C. Rcd. 5333, ¶ 82 (1994); Assessment & Collection of Regulatory Fees for Fiscal Year 1995, *Report and Order*, 10 F.C.C. Rcd. 13512, 13534 (1995) ("Television Satellite Stations (authorized pursuant to Note 5 of Section 73.3555 of the Commission's Rules) that retransmit programming of the primary station will be assessed a fee separate from the fee for fully operational television stations"); Assessment & Collection of Regulatory Fees for Fiscal Year 1999, *Report and Order*, 14 F.C.C. Rcd. 9868, 9936 (1999).

<sup>23</sup> Television Satellite Stations Review of Policy Rules, *Report and Order*, 6 FCC Rcd 4212, ¶ 3 (1991) (*Satellite Station Review*).

<sup>24</sup> 47 C.F.R. § 0.406; see *Life on the Way Communications, Inc., Forfeiture Order* 30 FCC Rcd 2603, 2607 (2015).

<sup>25</sup> 31 U.S.C. § 3701(b)(1); accord 31 C.F.R. § 900.2; 47 C.F.R. 1.1901(e).

fee. Thereafter, the Managing Director, under delegated authority, will determine if the station with these characteristics demonstrates it should be charged a fee “based on the number of television households served, and it will be charged the same fee as stations serving markets with the same number of television households” using information derived from “the Arbitron [now A.C. Nielsen] market data in the [Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications ].”<sup>26</sup> These characteristics have changed.

Relevant to annual regulatory fees, section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, codified at 47 U.S.C. § 534, provides that a station’s market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission’s rules specifies that a commercial broadcast television station’s market is its Designated Market Area (DMA), which reflects viewing patterns, as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications.<sup>27</sup>

Under 47 C.F.R. §§1.1160(a) and 1.1166, a refund may be made only under specific circumstances, *e.g.*, “[w]hen no regulatory fee is required or an excessive fee has been paid” or “[w]hen a waiver is granted in accordance with § 1.1166.”<sup>28</sup> Under § 1.1166, fees may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest.<sup>29</sup> An

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<sup>26</sup> Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12763, ¶¶ 21-22 (1995) (1994 MO&O); Assessment and Collection of Regulatory Fees for Fiscal Year 1996, *Report and Order*, 11 FCC Rcd 18774, 18786, ¶ 32 (1996) (“We ... rely on Nielsen’s DMA market rankings ... Nielsen data is generally accepted throughout the industry and will be updated and published annually ... We will consider the equities concerning the fees of licensees that change markets on a case-by-case basis, upon request, and, where a licensee demonstrates that it does not serve its assigned market, we will consider reducing the assigned fees to a more equitable level, based upon the area actually served by the licensee.”).

<sup>27</sup> 47 C.F.R. § 76.55(e)(2); Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14492, ¶ 34 (2000) (“Fees for television stations are based on market size as determined by Nielsen. This is the only consistent source the Commission has for determining which market a station serves.”). *See also* Amendment to the Commission’s Rules Concerning Market Modification, 30 FCC Rcd 10406 ¶ 6, n. 19 (2015), (“The Nielsen Company delineates television markets by assigning each U.S. county (except for certain counties in Alaska) to one market based on measured viewing patterns both off-air and via MVPD distribution.”); Designated Market Areas: Report to Congress, 31 FCC Rcd 5463, 5465-66 ¶ 6 (2015),

Nielsen divides the United States into 210 DMAs. DMAs describe each television market in terms of a group of counties and are defined by Nielsen based on measured viewing patterns. [fn deleted] The counties included in a DMA generally are clustered geographically around the major metropolitan area or areas in that DMA, where the majority of the market’s television stations usually are located. DMAs are in part primarily designed to facilitate commercial purposes — such as program acquisition, the sale of advertising, and network compensation — and thus primarily represent market areas where broadcasters acquire programming and sell advertising. [fn deleted] Because DMAs are based on viewing patterns as measured by Nielsen irrespective of state boundaries, a large number of DMAs cross state lines and include counties from multiple states. [fn deleted]

<sup>28</sup> 47 C.F.R. § 1.1160(a)(1) & (3).

<sup>29</sup> 47 C.F.R. § 1.1166; *cf.* 47 C.F.R. § 1.3.

applicant seeking a waiver of the penalty and assessed charges has the burden of demonstrating compelling and "most extraordinary circumstances"<sup>30</sup> to justify waiver of the penalty.

Under the Commission's rules, an *application* includes, in addition to petitions and applications elsewhere defined in the Commission's rules, any request, as for assistance, relief, declaratory ruling, or decision, by the Commission or on delegated authority.<sup>31</sup> A debt is delinquent when it "has not been paid by the date specified."<sup>32</sup> Upon filing, the Commission will examine an "application (including a petition for reconsideration or any application for review of a fee determination) ... to determine if the applicant has paid the appropriate application fee, appropriate regulatory fees, is delinquent in its debts owed the Commission, or is debarred from receiving Federal benefits[, and a]ction will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination ... until full payment or arrangement to pay any non-tax delinquent debt owed to the Commission is made and ... the application may be dismissed."<sup>33</sup> Moreover, "[i]f a delinquency has not been paid or the debtor has not made other satisfactory arrangements within 30 days of the date of the notice provided pursuant to paragraph (b)(2) of this section, the application or request for authorization will be dismissed."<sup>34</sup> Additionally, under 47 C.F.R. § 1.1161(c),<sup>35</sup> the Commission will withhold action on any application or request filed by a delinquent debtor applicant, and if after 30 days payment or a satisfactory arrangement is not made, dismiss the application.

An applicant seeking a waiver, reduction, or deferral of a fee must comply with 47 C.F.R. § 1.1166, which provides,

The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. ... (a) ... All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission. (1) If the request for waiver, reduction or deferral is accompanied by a fee payment, the request must be submitted to the Commission's lockbox bank at the address for the appropriate

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<sup>30</sup> McLeodUSA Telecommunications Services, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 6587, 6589, ¶ 8 (2004) (*McLeodUSA Telecommunications*) (denying the request for waiver of 25 percent penalty).

<sup>31</sup> 47 C.F.R. § 1.1901(d).

<sup>32</sup> 47 C.F.R. § 1.1901(i).

<sup>33</sup> 47 C.F.R. § 1.1910(a) & (b).

<sup>34</sup> 47 C.F.R. § 1.1910(b)(3).

<sup>35</sup> 47 C.F.R. § 1.1161(c) provides:

(1) Where an applicant is found to be delinquent in the payment of regulatory fees, the Commission will make a written request for the fee, together with any penalties that may be rendered under this subpart. Such request shall inform the regulatee that failure to pay may result in the Commission withholding action on any application or request filed by the applicant. The staff shall also inform the regulatee of the procedures for seeking Commission review of the staff's determination.

(2) If, after final determination that the fee is due or that the applicant is delinquent in the payment of fees and payment is not made in a timely manner, the staff will withhold action on the application or filing until payment or other satisfactory arrangement is made. If payment or satisfactory arrangement is not made within 30 days, the application will be dismissed.

service set forth in §§1.1152 through 1.1156 of this subpart. (2) If no fee payment is submitted, the request should be filed with the Commission's Secretary.

Under 47 C.F.R. § 1.2, a regulatee may request a declaratory ruling to remove an uncertainty.

### *Discussion*

We dismiss the *Request* because Licensee is delinquent in paying debts owed to the Commission and, for the separate alternative grounds, we deny the *Request* because Licensee failed to establish that the fee should be reduced. We discuss each point below.

#### Licensee is delinquent in paying debts owed to the Commission.

We dismiss the *Request* as provided for under 47 C.F.R. §§1.1161(c)(2), 1.1164(e), 1.1167(b), and 1.1910(b), because Licensee is delinquent in paying debts owed to the Commission. Specifically, the Commission's records show that Licensee is delinquent in paying regulatory fees for FY 2013 and FY 2014.<sup>36</sup> Licensee knows it is delinquent in paying these debts owed to the Commission.

The Commission's rule, 47 C.F.R. § 1.1161(c), provides, in relevant part, that upon finding that an applicant is delinquent in paying a regulatory fee, and making demand for payment of the delinquent fee and accrued charges, the Commission will withhold action on any application or request filed by an applicant, and if within 30 days, payment or satisfactory arrangement for payment is not made, the application will be dismissed.<sup>37</sup>

Moreover, 47 C.F.R. § 1.1164(e) requires dismissal of a "pending or subsequently filed application" where the applicant is "determined to be delinquent in paying a standard regulatory fee."<sup>38</sup>

Furthermore, 47 C.F.R. § 1.1910(b)(2),<sup>39</sup> the Commission's red light rule, provides, "[a]ction will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or requests for authorization by any entity found to be delinquent in its debt to the Commission .... The entity will be informed that action will be withheld on the application until full payment ... is made and/or that the application may be dismissed."

Because Licensee is delinquent in paying debts owed to the Commission, we dismiss the *Request*.<sup>40</sup> This ends the matter; however, as a matter of administrative economy, we will discuss the separate alternative grounds for denying the *Request*.

<sup>36</sup> 31 U.S.C. § 3711(g); 31 C.F.R. § 285.12; 47 C.F.R. § 1.1917.

<sup>37</sup> 47 C.F.R. § 1.1161(c).

<sup>38</sup> 47 C.F.R. § 1.1164(e).

<sup>39</sup> 47 C.F.R. § 1.1910(b)(2).

<sup>40</sup> 47 C.F.R. §§ 1.1161, 1.1164, 1.1167, and 1.1910.

Licensee fails to demonstrate payment of an excessive fee  
or the basis for a waiver or refund.

In the alternative, for the following separate reasons that Licensee failed to demonstrate it paid an excessive fee or that its situation warrants a waiver of the fee and a refund, we deny the *Request*.

Under the Commission's rules at 47 C.F.R. §§ 1.1160(a) and 1.1166, a refund may be made only under specific circumstances, e.g., "[w]hen no regulatory fee is required or an excessive fee has been paid" or "[w]hen a waiver is granted in accordance with § 1.1166."<sup>41</sup> Under § 1.1166, fees may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest.<sup>42</sup> Licensee fails to establish grounds for a refund or waiver.<sup>43</sup>

Licensee's fee for a commercial television station is based upon the size of the Nielsen DMA,<sup>44</sup> the fact and procedure for which Licensee neither disputes nor challenges as being erroneous. Rather, the essence of Licensee's *Request* is that a reduction of the determined fee amount is appropriate because the station's over-the-air broadcast signal reaches a reduced portion of the population of the designated DMA and it asserts (without benefit of a Commission determination) that it is a satellite station of a television station of a different classification. Licensee adds that its cable carriage and Telemundo network affiliation are of marginal value in determining whether the fee paid is excessive. In Licensee's view, the Commission's discussion in paragraph 21 of 1994 MO&O should control.<sup>45</sup> Licensee's approach is wrong.

The Nielsen DMA reflects actual viewing patterns including cable and satellite delivery and network affiliation.<sup>46</sup> Moreover, as we discuss next, Licensee's reliance on the 1994 MO&O is misplaced because Licensee fails to demonstrate that the circumstances described as the grounds for relief in 1994 MO&O are valid now, that the characteristics enumerated in the 1994 MO&O apply to Licensee, and that Licensee's payment is excessive.

<sup>41</sup> 47 C.F.R. § 1.1160(a)(1) & (3).

<sup>42</sup> 47 C.F.R. § 1.1166; cf 47 C.F.R. § 1.3.

<sup>43</sup> Consistent with 47 C.F.R. § 1.1160(a)(1), we considered Licensee's entire submission.

<sup>44</sup> 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.55(e)(2); Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14492, ¶ 34 (2000); see FY 2001 Mass Media Regulatory Fees, *Public Notice* (Aug. 7, 2001); FY 2002 Media Services Regulatory Fees, *Public Notice* (Aug. 7, 2002), What You Owe-Media Services Licensees For FY 2013, *Regulatory Fees Fact Sheet* (Sep. 5, 2013), What You Owe-Media Services Licensees For FY 2014, *Regulatory Fees Fact Sheet* (Sep. 5, 2014) ("Fees for commercial television stations are based upon the size of the Nielsen Designated Market Area ...."), What You Owe-Media Services Licensees For FY 2015, *Regulatory Fees Fact Sheet* (Sep. 11, 2015) ("Fees for commercial television stations are based upon the size of the Nielsen Designated Market Area ....").

<sup>45</sup> *Request* at 2.

<sup>46</sup> Amendment to the Commission's Rules Concerning Market Modification, 30 FCC Rcd 10406 ¶ 6, n. 19, *supra*; Designated Market Areas: Report to Congress, 31 FCC Rcd at 5465-66 ¶ 6, *supra*.

First, Licensee asserts that the "Commission [determined it] would entertain regulatory fee reduction requests from [certain] television broadcast station licensee ... [and t]he Commission has *not* modified [the 1995 and 1996] rulings,"<sup>47</sup> so, based on the discussion in paragraph 21 of the 1994 *MO&O*, in Licensee's view, the Commission "did not require that all of the[] ... characteristics be present to warrant a fee reduction[, rather] reductions are appropriate on an equitable basis for relatively small stations outlying ... of large markets, where the smaller stations are not on a par with stations ... within that same market's principal city or cities."<sup>48</sup> Next, Licensee acknowledges the Managing Director may "consider reducing the assigned fees" where "a licensee demonstrates that it does not serve its assigned market."<sup>49</sup>

Even as the discussion in the 1994 *MO&O* forming the basis for a reduction of the fee are enumerated necessary characteristics, characteristics existing in 1995 have changed. At that time, applicants considered for relief "were generally UHF stations ... lack[ing] network affiliations ... located outside of the principle city's metropolitan area and do not provide a Grade B signal to a substantial portion of the market's metropolitan areas. Often these stations are not carried by cable systems serving the principal metropolitan areas"<sup>50</sup> To show whether a station "serve[s] the principal metropolitan areas within their assigned markets and serve[s]" a particular number of "television households ... [the applicant should present information] derived from the Arbitron market data in the Television and Cable Fact Book."<sup>51</sup>

Over time, however, circumstances existing in 1995 changed. For example, major changes since then modify the characteristics. Hence, an applicant for relief now must consider and address those relevant changes or invite denial of the relief. Licensee's *Request* fails to align its situation to the characteristics.

First, the Commission relies on A.C. Nielsen ratings to determine which market a station serves,<sup>52</sup> and thereafter "[f]ees for television stations are based on market size as determined by Nielsen."<sup>53</sup> As to fee determinations, in 1996, the Commission said it would consider cases in which an applicant demonstrated it does not serve its assigned market, however, in 2000, the

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<sup>47</sup> *Id.* at 1.

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.* at 2-3.

<sup>50</sup> 1994 *MO&O*, 10 FCC Rcd at 12763, ¶ 21.

<sup>51</sup> *Id.* at 12763, ¶ 22.

<sup>52</sup> Assessment and Collection of Regulatory Fees for Fiscal Year 1996, *Report and Order*, 11 FCC Rcd 18774, 18786, ¶ 32 (1996) ("We ... rely on Nielsen's DMA market rankings ... Nielsen data is generally accepted throughout the industry and will be updated and published annually ... We will consider the equities concerning the fees of licensees that change markets on a case-by-case basis, upon request, and, where a licensee demonstrates that it does not serve its assigned market, we will consider reducing the assigned fees to a more equitable level, based upon the area actually served by the licensee."); Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14492, ¶ 34 (2000) (Commission rejected commenter's "argu[ment] that small television stations located near large designated market areas (DMA) are assessed disproportionately high fees because the A.C. Nielsen ratings include them in the DMA but they do not serve households in the DMA. Fees for television stations are based on market size as determined by Nielsen. This is the only consistent source the Commission has for determining which market a station serves.").

<sup>53</sup> Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd at 14492, ¶ 34, *supra*.



Commission noted that it “is unaware of the existence of any reliable published source that can identify which television stations are serving small markets at the fringe of larger DMA’s.”<sup>54</sup> Thus, Licensee must shoulder the heavy burden of establishing that its circumstances fall within these defined limits and that the Nielsen ratings are wrong. The Nielsen rating standard is codified at 47 C.F.R. § 76.55(e)(2), which provides, “[e]ffective January 1, 2000, a commercial broadcast television station’s market, unless amended pursuant to § 76.59, shall be defined as its Designated Market Area (DMA) as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications.” The DMA recognizes viewing patterns, and the annual regulatory fee is based upon the size of the Nielsen DMA. Licensee has not distinguished its situation from that accepted fact or shown that the designation is wrong.

Next, although Licensee acknowledges it must demonstrate the “area actually served,” it focuses instead on its over the air signal, and points to its *Engineering Statement*. Even though Licensee acknowledges its “carriage by certain cable systems,”<sup>55</sup> it does not identify the system or systems, instead choosing to state the “factor is hardly dispositive.”<sup>56</sup> Moreover, Licensee fails to discuss the pertinent fact that by statute (47 U.S.C. § 534) cable operators are required to carry the signals of all qualified television stations in their local market and that DBS providers are required to carry the signals of all qualified television stations in a local market if they choose to carry the signal of at least one local television station in that market. *See* 47 U.S.C. § 338; 17 U.S.C. § 122. These are material factors in the consideration of the reach into the DMA. Additionally, Licensee claims its “affiliat[ion] with the fledgling Heroes and Icons TV network” is “of marginal relevance” and that Heroes and Icons TV is not “a major network ... of the kind prevalent in 1995.”<sup>57</sup> Except to include a footnote to its pleading, Licensee does not make its case that Heroes and Icons TV is of marginal importance in the viewing area. Indeed, Licensee’s unsupported generalizations do not demonstrate Nielsen DMA information is erroneous. Furthermore, Licensee fails to disclose fully ADS systems, including specific carriage arrangements, United States census information, and the details of network affiliation information concerning the Albuquerque-Santa Fe DMA. Indeed, Licensee does not explain the apparent dichotomy between its assertion that the signal does not reach Albuquerque and the public information showing station coverage and a business office address in the city of Albuquerque.<sup>58</sup> Crucially, Licensee fails to show the area actually served or to present “the existence of any reliable published source that can identify which television stations are serving small markets at the fringe of larger DMA’s.”<sup>59</sup> Licensee’s *Request* fails to demonstrate under 47 C.F.R. § 1.1160(a) that the fee paid is excessive (or that no fee is due).

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<sup>54</sup> *Id.* at 14493.

<sup>55</sup> *Request* at 6.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See [https://en.wikipedia.org/wiki/List\\_of\\_television\\_stations\\_in\\_New\\_Mexico](https://en.wikipedia.org/wiki/List_of_television_stations_in_New_Mexico); [https://www.bing.com/maps?&ty=18&q=Ktel%20Albuquerque%20NM&ss=ypid.YN594x10279396&ppois=35.1058807373047\\_-106.59049987793\\_Ktel\\_YN594x10279396~&cp=35.105881~-106.5905&v=2&sV=1](https://www.bing.com/maps?&ty=18&q=Ktel%20Albuquerque%20NM&ss=ypid.YN594x10279396&ppois=35.1058807373047_-106.59049987793_Ktel_YN594x10279396~&cp=35.105881~-106.5905&v=2&sV=1).

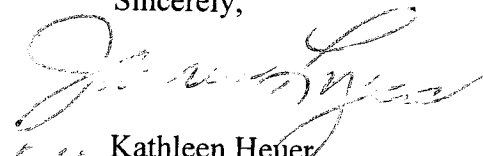
<sup>59</sup> Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, *supra*, 15 FCC Rcd at 14492, ¶ 34.

Finally, even if we construe Licensee's *Request* as seeking a waiver under 47 C.F.R. §1.1166, Licensee fails to establish for a waiver both *good cause*<sup>60</sup> and a finding that the *public interest will be served thereby*.<sup>61</sup> Licensee's unsupported assertions (as are discussed above) do not present either good cause or that the public interest will be served by granting a waiver. Accordingly, we deny the *Request*.

Licensee is a delinquent debtor, hence until the full amount is paid or satisfactory arrangements are made, Licensee is subject to the Commission's administrative sanctions of withholding action on and dismissal of any application or request as is set forth at 47 C.F.R. §§ 1.1161, 1.1164(e)<sup>62</sup> and 1.1910. To be clear, this renews our demand that Licensee pay immediately the full amount of all delinquent debts owed the Commission.

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202 418-1995).

Sincerely,



Kathleen Heuer  
Chief Financial Officer

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<sup>60</sup> 47 C.F.R. § 1.3.

<sup>61</sup> 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166. See also 1994 Report and Order, 9 FCC Rcd at 5354, ¶ 65; *WAIT Radio v. FCC*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166; *Phoenix Broadcasting, Inc.*, *supra*, 18 FCC Rcd at 26466.

<sup>62</sup> 47 C.F.R. §§ 1.1161(c) ((1) "failure to pay may result in the Commission withholding action on any application or request filed ... (2) If, after final determination that the fee is due or that the applicant is delinquent in the payment of fees and the payment is not made in a timely manner, the staff will withhold action on the application or filing [and i]f payment ... in not made ... the application will be dismissed."), 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee .... The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment."), 1.1910.

## FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAY 24 2017

OFFICE OF  
MANAGING DIRECTOR

John C. Trent, Esquire  
Putbrese Hunsaker & Trent, P.C.  
200 South Church Street  
Woodstock, Virginia 22664

Licensee/Applicant/Petitioner: **Todd W. Fowler, Acting Receiver**  
Request: **Petition for Reconsideration**  
Station: WHLQ-FM (formerly WHFD-FM)  
Disposition: **Dismissed and Denied** ((47 U.S.C. §§ 159, 405; 47 C.F.R. §§ 0.401, 1.3, 1.7, 1.65, 1.106, 1.1157(c)(1), 1.1160, 1.1161, 1.1164, 1.1166, 1.1910)  
Request for Exemption from Fiscal Year (FY) 2011 Regulatory Fee  
Date of payment: Delinquent  
Fee Control No.: RROG 11-00014061

Dear Counsel:

This responds to a Petition for Reconsideration (Petition)<sup>1</sup> from Todd W. Fowler, Acting Receiver of Radio Station WHLQ (FM) (Petitioner), seeking reversal of the Chief Financial Officer (CFO's) October 25, 2011 letter (Dismissal<sup>2</sup>) dismissing Petitioner's August 19, 2011, request for an exemption of the Fiscal Year (FY) 2011 regulatory fee owed for radio station WHLQ-FM (Request<sup>3</sup>). The Petition, not filed in accordance with the Commission's rules,<sup>4</sup> asserts the "decision to deny the waiver ... is totally inconsistent with past precedent" and that that an "error occurred in the evaluation of the requisite waiver ... that ... must be reversed, based upon *Melody Music[, Inc. v. FCC]*, 345 F.2d 730 (D.C. Cir. 1965)]."<sup>5</sup> As we discuss below, we dismiss and deny the Petition because it was not filed with the Commission,<sup>6</sup> the Petitioner is

<sup>1</sup> Todd W. Fowler, Acting Receiver WHLQ(FM), Lawrenceville, VA, Request for Exemption of 2011 Regulatory Fee, Fee No.: RROG 11-00013753, Facility ID No. 72503, TO: Chief Financial Officer, Office of Managing Director, Petition for Reconsideration (Nov. 22, 2011) (Petition) with Exhibit 1, Putbrese Hunsaker & Trent, P.C. v. Katrina Chase, et al., (VA Cir. Ct, Case No. CL09-7194-01), Order (Feb. 9, 2011), Exhibit 2, Letter from Mark Stephens, Chief Financial Officer, FCC, Washington, DC to John C. Trent, Esq., Putbrese Hunsaker & Trent, P.C., 200 South Church St., Woodstock, VA 22664 (Mar. 18, 2011).

<sup>2</sup> Letter from Mark Stephens, Chief Financial Officer, FCC, Washington, DC 20554 to John C. Trent, Esquire, Putbrese Hunsaker & Trent, P.C., 200 South Church St., Woodstock, VA 22664 (Oct. 25, 2011) (Dismissal Letter).

<sup>3</sup> Letter from John C. Trent, Law Offices of Putbrese Hunsaker & Trent, P.C., 200 South Church St., Woodstock, VA 22664 to FCC, Office of the Managing Director, 445 12<sup>th</sup> St., S.W., Room 1-A625, Washington DC 20554, Facsimile No. (202 418-7869 (Aug. 19, 2011)(Request).

<sup>4</sup> 47 C.F.R. §§ 0.401, 1.7, 1.44, 1.106(i), and 1.1166.

<sup>5</sup> Petition at 2.

<sup>6</sup> 47 C.F.R. §§ 0.401. ("The Commission maintains several offices and receipt locations. Applications and other filings not submitted in accordance with the addresses or locations set forth below will be returned to the applicant

delinquent in paying fees owed to the Commission,<sup>7</sup> and the Petitioner has not established grounds for reconsideration.<sup>8</sup>

### *Background*

On August 19, 2011, Petitioner sent the Request by facsimile and email a letter to the Office of the Managing Director seeking “a waiver of the annual FY 2011 regulatory fee ... for the Station [WHLQ (FM) (formerly WHFD)]” on the assertion that “[u]nder ... Section 1.1162(b) [of Title 47 Code of Federal Regulations], duly appointed public officials are fee exempt [and i]n addition to being a duly appointed Virginia State Officer of the Courts, the Station, being in the nature of a Receivership, is in financial hardship.”<sup>9</sup> Petitioner added, the Commission “has granted waivers of the fees due to financial hardships on numerous occasions.”<sup>10</sup> Petitioner, however, did not either pay the fee or file a separate petition to defer payment due to financial hardship, supported by documentation of the financial hardship. Finally, Petitioner asked “that any late penalty be waived and ... that the Commission does not associate a ‘red-light’ designation with the Station.”<sup>11</sup>

On October 25, 2011, the CFO, acting on delegated authority, dismissed the Request because Petitioner failed to (a) include documentation to support the request that “Todd W. Fowler qualifies as a government entity [under 47 C.F.R. § 1.1162(b)]” and (b) pay the fee or file a petition to defer payment due to financial hardship, supported by documentation of the financial hardship as is required by 47 C.F.R. § 1.1166(c). The Dismissal notified Petitioner the FY 2011 regulatory fee plus the 25 percent penalty was due within 30 days from the date of the letter. The Dismissal warned:

If you fail to pay the full amount due by that date, interest and applicable additional penalties required by 31 U.S.C. § 3717 will accrue from the date of this letter, and under the law,<sup>12</sup> the Commission will initiate collection proceedings.

Because you are delinquent in paying the FY 2011 regulatory fee, a debt owed the United States, under 47 C.F.R. § 1.1910, the Commission will withhold action on any application filed or pending, and if the debt plus the accrued penalty is not paid, or other satisfactory arrangements are not made, any application filed or pending may be dismissed. Moreover, the Commission may collect amounts due by administrative offset.<sup>13</sup>

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without processing. When an application or other filing does not involve the payment of a fee, the appropriate filing address or location is established elsewhere in the rules for the various types of submissions made to the Commission.”), 1.7 (“Unless otherwise provided in this Title, by Public Notice, or by decision of the Commission or of the Commission’s staff acting on delegated authority, pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.”).

<sup>7</sup> 47 U.S.C. §§ 159(c)(2), 405(a); 47 C.F.R. §§ 1.1164(e), 1.1167(b), 1.1910.

<sup>8</sup> 47 C.F.R. §§ 0.445(e), 1.106.

<sup>9</sup> Request.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See 47 C.F.R. § 1.1901, *et seq.*

<sup>13</sup> 47 C.F.R. § 1.1912.

(Footnotes in original.)

On November 22, 2011, Petitioner submitted to the CFO this Petition that incorrectly characterizes the underlying action as a denial, rather than a dismissal of the submission, and asserting (a) Petitioner is “a duly appointed agent of the Courts of the Commonwealth of Virginia,” (b) the Dismissal “is totally inconsistent with past precedent in matters pertaining to licensees who are bankrupt and or are in receivership,” and (c) “[t]here is absolutely no difference between the Hagan situation [March 18, 2011, letter granting a waiver request] and in this ... matter.”<sup>14</sup>

### *Standards*

Under 47 C.F.R. § 1.106(i), “Petitions for reconsideration ... shall be submitted to the Secretary, Federal Communications Commission, Washington, DC 20554, by mail, by commercial courier, by hand, or by electronic submission through the Commission’s Electronic Comment Filing System or other electronic filing system (such as ULS). Petitions submitted only by electronic mail and petitions submitted directly to staff without submission to the Secretary shall not be considered to have been properly filed.”<sup>15</sup> The Commission maintains different offices for different purposes, and persons filing documents with the Commission must take care to ensure that they file their documents at the correct location specified in the Commission’s Rules.<sup>16</sup> A document is *filed* with the Commission upon its receipt at the location designated by the Commission,<sup>17</sup> and applications and other filings not submitted in accordance with the correct addresses or locations will be returned to the filer without processing.<sup>18</sup>

Under 47 C.F.R. § 1.106(d), a petition for reconsideration must “state with particularity the respects in which petitioner believes the action taken by ... the designated authority should be changed,”<sup>19</sup> and the petition must identify a material error, omission or reason warranting reconsideration.<sup>20</sup> Furthermore, under subsection 1.106(p), the Commission may dismiss or deny a “Petition[] for reconsideration of a Commission action that plainly do[es] not warrant consideration by the Commission” on one or more of the non-exclusive listing of examples.

The filing of a petition for reconsideration does not “excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without special order of the Commission”<sup>21</sup> and it “will not relieve licensees from the requirement that full and proper payment of the

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<sup>14</sup> Petition at 1-2.

<sup>15</sup> 47 C.F.R. § 1.106(i). *See also* 47 C.F.R. § 1.1159(b) (“Petitions for reconsideration ... submitted with no accompanying payment should be filed with the Secretary ....”).

<sup>16</sup> 47 C.F.R. § 0.401.

<sup>17</sup> 47 C.F.R. § 1.7

<sup>18</sup> 47 C.F.R. § 0.401.

<sup>19</sup> 47 C.F.R. § 1.106(d)(1).

<sup>20</sup> 47 C.F.R. § 1.106(d)(2).

<sup>21</sup> 47 U.S.C. § 405(a).

underlying fee payment be submitted, as required by the Commission's action, or delegated action, on a request for waiver, reduction or deferment."<sup>22</sup>

In establishing the regulatory fee program mandated by Congress,<sup>23</sup> the Commission set out the relevant schedules of the annual fees and the established procedures for, among other matters, payment, waivers, reductions, and deferral, payment, refunds, error claims, and, penalties.<sup>24</sup>

Pertinent to the waiver provision at 47 U.S.C. § 159(d), the Commission recognized that in certain instances, payment of a regulatory fee may impose an undue financial hardship upon a licensee, and it may be waived, reduced or deferred, but only upon a showing of good cause and a finding that the public interest will be served thereby.<sup>25</sup> An applicant must show compelling and extraordinary circumstances that outweigh the public interest in recouping the Commission's regulatory costs.<sup>26</sup> In an appropriate situation, fee relief may be based on a "sufficient showing of financial hardship;"<sup>27</sup> however, "[m]ere allegations or documentation of financial loss, standing alone," do not suffice and "it [is] incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."<sup>28</sup> Thus, to establish a basis for waiver predicated on financial need, the regulatee must provide financial documents including, *e.g.*, a licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of their officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information. On this information, the Commission considers on a case-by-case basis whether the licensee met the standard to show the station lacks sufficient funds to pay the regulatory fee and maintain service to the public.<sup>29</sup>

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<sup>22</sup> 47 C.F.R. § 1.1167(b)(2) ("The filing of a petition for reconsideration or an application for review of a fee determination will not relieve licensees from the requirement that full and proper payment of the underlying fee payment be submitted, as required by the Commission's action, or delegated action, on a request for waiver, reduction or deferment. ... If the fee payment should fail while the Commission is considering the matter, the petition for reconsideration or application for review will be dismissed."); see Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for Fiscal Year 1994, *Report and Order*, 9 FCC Rcd 5333, 5346, ¶ 35 (1994), *recon. granted in part*, 10 FCC Rcd 12759 (1995) (*FY 1994 R&O*) ("The filing of a petition for reconsideration will not toll th[e] 30-day period."). See 47 C.F.R. § 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment. The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment.").

<sup>23</sup> See 47 C.F.R. § 1.1151.

<sup>24</sup> See 47 C.F.R. Part 1, Subpart G.

<sup>25</sup> 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). *FY 1994 R&O*, 9 FCC Rcd at 5344 ¶ 29.

<sup>26</sup> *Id.*

<sup>27</sup> Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12761-62, ¶ 13 (1995) (*FY 1994 MO&O*).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

As set forth in 47 C.F.R. § 1.65, “[e]ach applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application ... whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall promptly as possible and in any event within 30 days ... amend the application ... so as to furnish such additional or corrected information ... .”

Concerning payment, Congress mandated certain sanctions to promote timely and complete payment. Enforcement sanctions at 47 U.S.C. § 159(c) provide for the automatic assessment of a 25 percent penalty, a mandate that the Commission “may dismiss any application or other filing for failure to pay in a timely manner any fee or penalty under this section,” and direction that “[i]n addition to or in lieu of the penalties and dismissals ... the Commission may revoke any instrument of authorization held by an entity that has failed to make payment of a regulatory fee ... .”<sup>30</sup> Corresponding Commission rules are set out at 47 C.F.R. §§ 1.1157 and 1.1164, *i.e.*, “[a]ny late filed regulatory fee payment will be subject to the penalties set forth in section 1.1164,”<sup>31</sup> which includes “a 25 percent penalty of the amount of the fee ... not paid in a timely manner,”<sup>32</sup> dismissal of “the delinquent payor’s pending applications,”<sup>33</sup> and dismissal of “[a]ny pending or subsequently filed application.”<sup>34</sup>

An application, “includes in addition to petitions and applications elsewhere defined in the Commission’s rules, any request, as for assistance, relief, declaratory ruling, or decision, by the Commission or on delegated authority.”<sup>35</sup> Under the Commission’s procedures, “[a]n application (including a petition for reconsideration or any application for review of a fee determination) ... will be examined to determine if the applicant has paid the appropriate application fee, appropriate regulatory fees, is delinquent in its debts owed the Commission, or is debarred from receiving Federal benefits (*see, e.g.*, 31 CFR 285.13; 47 CFR part 1, subpart P).”<sup>36</sup> Furthermore, “[a]pplications by any entity found not to have paid the proper application or regulatory fee will be handled pursuant to the rules set forth in 47 CFR part 1, subpart G.”<sup>37</sup> Additionally, “[a]ction will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or requests for authorization by any entity found to be delinquent in its debt to the Commission (see §1.1901(i))”<sup>38</sup> ... If a delinquency has not been paid or the debtor has not made other satisfactory arrangements within 30 days of the date of the notice provided pursuant to paragraph (b)(2) of this section, the application or request for authorization will be dismissed.”<sup>39</sup> Hence, consistent with 47 U.S.C. § 159(c)(2) and 47 C.F.R. §§ 1.1164, 1.1166, and 1.1910, when an applicant for relief is delinquent

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<sup>30</sup> 47 U.S.C. § 159(c).

<sup>31</sup> 47 C.F.R. § 1.1157(c)(1).

<sup>32</sup> 47 C.F.R. § 1.1164.

<sup>33</sup> 47 C.F.R. § 1.1164(c).

<sup>34</sup> 47 C.F.R. § 1.1164(e), *accord* 47 C.F.R. § 1.1167(b)(2).

<sup>35</sup> 47 C.F.R. § 1.1901(d).

<sup>36</sup> 47 C.F.R. § 1.1910(a)(1).

<sup>37</sup> 47 C.F.R. § 1.1910(b)(1).

<sup>38</sup> 47 C.F.R. § 1.1910(b)(2).

<sup>39</sup> 47 C.F.R. § 1.1910(b)(3).

in paying the regulatory fee, the Commission will dismiss<sup>40</sup> the request for relief and impose the statutory penalty.<sup>41</sup>

### Discussion

The Commission's orders and rules include well-established procedures for filing applications at the Commission including, for example, submitting a petition for reconsideration and the consequences when a licensee fails to comply.<sup>42</sup>

Pertinent to the matter before us, section 1.106(i) of Title 47, Code of Federal Regulations, specifies that a petition for reconsideration must be filed with the Secretary, and section 1.106(d)(1) specifies that the petitioner must show either a material error in the Commission's original order or raise changed circumstances or unknown additional facts not known or existing at the time of petitioner's last opportunity to present such matters.<sup>43</sup> Also, a petition for reconsideration does not excuse the petitioner from complying with the order or requirement of the Commission on delegated authority.<sup>44</sup> Our rule provides, petitions for reconsideration that "plainly do not warrant consideration by the Commission may be dismissed or denied by the relevant bureau(s) or office(s)."<sup>45</sup>

Here, Petitioner made two procedural missteps and thereby broached fatal impediments that result in our dismissal of the Petition without having to consider its substance. First, Petitioner sent the Petition to the CFO rather than complying with 47 C.F.R. §§ 1.106(i) and 1.1159(b) that require submission to the Secretary. Section 1.106(i), states, "petitions submitted directly to staff without submission to the Secretary shall not be considered to have been properly filed."<sup>46</sup> The Petition was not filed, so on that ground, we dismiss.<sup>47</sup>

<sup>40</sup> 47 U.S.C. § 159(c)(2) ("The Commission may dismiss any application or other filing for failure to pay in a timely manner any fee or penalty under this section."); 47 C.F.R. §§ 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment."); 1.1166(c) ("Waiver requests that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.").

<sup>41</sup> 47 U.S.C. § 159; 47 C.F.R. § 1.1166; Waivers, Reductions and Deferments of Regulatory Fees, *Regulatory Fees Fact Sheet* (Sep. 5, 2013) 2013 WL 4773993 (F.C.C.) ("The Commission will dismiss any petition for waiver of a regulatory fee that does not include a payment or the required petition for deferral and supporting documentation, and under 47 U.S.C. § 159(c) and 31 U.S.C. § 3717, the Commission is required to impose the 25% penalty and other relevant charges. A request for waiver, reduction or deferral must be received before the fee due date. \* \* \* The Commission will dismiss a waiver request filed by a delinquent debtor or a petition that does not have the required financial documentation.").

<sup>42</sup> See e.g., 47 C.F.R. §§ 1.44, 1.80, and 1.106.

<sup>43</sup> *WWIZ, Inc., Memorandum Opinion and Order*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); National Association of Broadcasters, *Memorandum Opinion and Order*, 18 FCC Rcd 24414 ¶ 4 (2003). See 47 C.F.R. § 1.106(d)(1) (petitions for reconsideration must "state with particularity the respects in which petitioner believes the action taken by the Commission ... should be changed") and 47 C.F.R. § 1.106(d)(2) (requiring petitioner to cite, where appropriate, "the findings [of fact] and/or conclusions [of law] which petitioner believes to be erroneous, and shall state with particularity the respects in which [the petitioner] believes such findings and/or conclusions should be changed").

<sup>44</sup> 47 U.S.C. § 405(a); 47 C.F.R. §§ 1.102, 1.1164(e), 1.1167(b)(2), *FY 1994 R&O*, 9 FCC Rcd at 5346 ¶ 35.

<sup>45</sup> 47 C.F.R. § 1.106(p).

<sup>46</sup> 47 C.F.R. § 1.106(i).

<sup>47</sup> 47 C.F.R. §§ 0.401, 1.106(p)(7).



Next, we withheld action on the Petition when it was received, and now we dismiss because Petitioner is delinquent in paying a debt owed the Commission. Petitioner's submission of a petition for reconsideration does not stop the Commission from continuing to enforce its rules or to collect the amount due, and, as appropriate, to transfer the delinquent debt to the U.S. Treasury.<sup>48</sup> Petitioner failed to pay the FY 2011 regulatory fee plus the 25% statutory penalty within 30 days from October 25, 2011. Our Dismissal notified Petitioner that if he failed to pay the full amount by the due date, interest and applicable additional penalties required by 31 U.S.C. § 3717 would accrue from October 25, 2011, that the debt was delinquent, so debt collection proceedings will be initiated, and the Commission would withhold action on any application filed or pending and thereafter dismiss.<sup>49</sup> Where, as here, Petitioner is delinquent in paying an obligation to the Commission, the Commission will dismiss any subsequently filed petition for reconsideration.<sup>50</sup> Thus, on this second ground we dismiss the Petition to dispose of the matter. As a matter of administrative economy, however, we next explain alternative reasons for denying the *Petition*.

Reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.<sup>51</sup> An applicant may not use a petition for reconsideration as a vehicle merely to reargue points previously advanced and rejected.<sup>52</sup>

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<sup>48</sup> 47 U.S.C. § 405(a) ("No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission."); 47 C.F.R. §§ 1.102(b)(2) ("If a petition for reconsideration of a non-hearing action is filed, the designated authority may in its discretion stay the effect of its action pending disposition of the petition for reconsideration.") and 1.1167(b) ("The filing of a petition for reconsideration ... of a fee determination will not relieve licensees from the requirement that full and proper payment of the underlying fee payment be submitted, as required by the Commission's action, or delegated action, on a request for waiver, reduction or deferment. ... Petitions for reconsideration and applications for review not accompanied by a fee payment should be filed with the Commission's Secretary and clearly marked to the attention of the Managing Director ... (2) If the fee payment should fail while the Commission is considering the matter, the petition for reconsideration or application for review will be dismissed."); Applications of East River Electric Power Cooperative, *Memorandum Opinion and Order*, 18 FCC Rcd 15977, 15982, ¶ 13 (2003) ("The existence of a pending Petition for Reconsideration or Application for Review does not prevent the Commission from continuing to apply its rules ....").

<sup>49</sup> Dismissal at 2.

<sup>50</sup> 47 C.F.R. §§ 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee"); 1.1167(b) ("The filing of a petition for reconsideration or an application for review of a fee determination will not relieve licensees from the requirement that full and proper payment of the underlying fee payment be submitted, as required by the Commission's action, or delegated action, on a request for waiver, reduction or deferment. ... If the fee payment should fail while the Commission is considering the matter, the petition for reconsideration or application for review will be dismissed."); 1.1910(b)(2) ("Action will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, ... by any entity found to be delinquent in its debt to the Commission ... action will be withheld on the application until full payment or arrangement to pay any non-tax delinquent debt owed to the Commission is made and/or that the application may be dismissed.").

<sup>51</sup> See 47 C.F.R. § 1.106; *WWIZ, Inc.*, 37 F.C.C. at 686; *NAB*, 18 FCC Rcd at 24415.

<sup>52</sup> Application of Jefferson-Pilot Communications Co., *Memorandum Opinion and Order*, 10 FCC Rcd 12120 ¶ 4 (1995) ("Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. ... reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken"); Dennis P. Corbett, Esq., *Letter*, 29 FCC Rcd 2093, 2094-95 (MB 2014).

Licensee has not identified a material error or omission that is contrary to the law and the Commission's established procedures.<sup>53</sup> We begin by reviewing Petitioner's Request, which also suffered from fatal procedural errors.

First, Petitioner "submitted [the Request] *via facsimile and email*" to the "Office of the Managing Director ... Room 1-A625," which is contrary to the Commission's procedural rule at 47 C.F.R. § 1.1166 that requires filing with the Secretary. As such, the Request was never filed and it was dismissible.<sup>54</sup> Nonetheless, at that time, as a matter of administrative economy, we looked to the substance of the Request and found it defective. Petitioner incorrectly sought an exemption from the fee under 47 C.F.R. § 1.1162(b),<sup>55</sup> which, as we explained in the Dismissal, refers to a government entity as the rule defines the term. To be clear, section 1.1162(b) provides:

For purposes of this exemption, a government entity is defined as any state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs.

47 C.F.R. § 1.1166(b); 47 U.S.C. § 159(h); *see* Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 FCC Rcd 5333, 5339-40 ¶¶ 14-16 (1994). In contrast to the plain words in our rule, Petitioner offered only his unsupported assertion that a "State Court Appointed Receiver for the Station" is a "duly appointed public official," and "should therefore be exempt,"<sup>56</sup> and that his appointment as a "Virginia State Officer of the Courts" gives him status contrary to the plain reading of the rule that provides an exemption for the government entity meeting the definition and exercising sovereign direction and control over a community or program. A state court appointed receiver or as Petitioner labeled, an "Officer of the Courts,"<sup>57</sup> is not a *government entity* as defined in our rule and Petitioner has not shown otherwise in the Request or Petition. We note, we need not discuss in detail Petitioner's misunderstanding that the term, "duly appointed public official," is not a defined "government entity," rather it refers to a

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("Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters. ... It is settled Commission policy that petitions for reconsideration are not to be used for the mere re-argument of points previously advanced and rejected.").

<sup>53</sup> 47 C.F.R. § 1.106(p)(1).

<sup>54</sup> 47 C.F.R. 1.7, 0.401, 1.1159(c), 1.1166.

<sup>55</sup> Request.

<sup>56</sup> Request.

<sup>57</sup> Petition failed to establish that receivership is an appointment as an officer of the court, but even so, such a designation does not create a person in the form of a government entity, and Petitioner fails to prove otherwise. Despite Petitioner's emphasis on the phrase, "Virginia State Officer of the Courts," Petitioner did not offer an additional definition or any legal authority to treat the term, officer of the court, as having more importance than its common meaning as set forth in Black's Law Dictionary (10th ed. 2014), *i.e.*, "officer of the court ... Someone who is charged with upholding the law and administering the judicial system. Typically, *officer of the court* refers to a judge, clerk, bailiff, sheriff, or the like, but the term also applies to a lawyer, who is obliged to obey court rules and who owes a duty of candor to the court."

person controlling the "government entity" as that term is defined to be a "political organization or subpart thereof" and that "duly appointed public official" must be empowered to exercise "sovereign direction and control" over the community or program. Now, Petitioner fails to establish that the CFO erred in relying on the plain meaning of section 1.1162(b) and concluding that Petitioner "did not furnish evidence that Todd W. Fowler qualifies as a government entity, and asserting that he is a court appointed receiver does not establish the existence of that exemption."<sup>58</sup> Petitioner fails to establish a material error in this determination.<sup>59</sup>

Next, Petitioner asserts the Dismissal is "totally inconsistent with past precedent in matters pertaining to licensees who are bankrupt and or are in receivership."<sup>60</sup> Petitioner's reference to an earlier dated letter from the CFO that granted relief to another applicant does not establish the existence of a material error in this decision. First, Petitioner has not established that the CFO erred in the Dismissal by determining the Petitioner failed to establish it was exempt under 47 C.F.R. § 1.1162(b) or that Petitioner failed to establish under 47 C.F.R. § 1.1166(c) a compelling case of financial hardship. Moreover, contrary to Petitioner's summary assertion, the statute and Commission's rules require the Commission to consider each request for a waiver of a regulatory fee individually. Plainly, 47 C.F.R. § 1.1166 provides that the Commission "may ... waive[]" payment of a fee "in specific instances, on a case-by-case basis, where good cause is shown and where waiver ... of the fee would promote the public interest." *Accord* 47 U.S.C. § 159(d). Thus, the decision to waive is within the discretion of the Commission, the action is not mandatory, and the action is limited to specific instances on a case-by-case basis, *i.e.*, individualized. Moreover, the law requires the applicant to make a case by establishing both prongs of the standard at 47 U.S.C. § 159(d) and 47 C.F.R. § 1.1166, "for good cause shown" and that the "action would promote the public interest." An incomplete and unsupported request to the Commission to treat an applicant as fee exempt or in financial hardship does not meet the standard. Furthermore, Petitioner does not bolster its position by referring to another summary decision that is not precedent.<sup>61</sup>

Next, Petitioner's mere assertion that he is a state-court appointed receiver does not establish financial hardship. Indeed, in this case, Petitioner failed to provide any evidence that the receivership appointment arose out of financial hardship experienced by the licensed station, and he failed to furnish any financial documentation supporting a claim that Petitioner lacks the funds to pay the fees. Instead, Petitioner offered in the Request and in his Petition, only a broad assertion that he is a state-court appointed receiver. That status without relevant evidence of the legal basis for appointment does not support a waiver. We note, state laws may differ, but a receiver may be appointed for many reasons not all of which are based on insolvency, and a receiver may be appointed merely to assume control of an asset for purposes of sale to satisfy a judgment due a third party. When the Commission referred to receivership proceedings,<sup>62</sup> it was speaking of those in the federal courts and in the context of a bankruptcy liquidation case.<sup>63</sup> In

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<sup>58</sup> Dismissal at 1.

<sup>59</sup> 47 C.F.R. § 1.106(p)(1).

<sup>60</sup> Petition at 1.

<sup>61</sup> 47 C.F.R. § 0.445(e).

<sup>62</sup> Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12761-62, ¶ 14 (1995) (FY 1994 MO&O).

<sup>63</sup> *Matter of Phillips*, 966 F.2d 926, 930 (5th Cir. 1992), *rehearing denied* (1992);

2003, the Commission explained, an applicant must show that the proceeding represents extraordinary and compelling circumstances justifying a waiver when balanced against the public interest in reimbursing the Commission for its costs as reflected in the statutory fee provisions.<sup>64</sup> The applicant must show the appointment was because of financial hardship and pursuant to federal law.<sup>65</sup>

Finally, Petitioner points to *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) to support the assertion that “broadcasters must be treated equally by the FCC.” Petitioner misunderstands the facts and holding in *Melody Music* and the standards applicable to a request for a waiver of a regulatory fee, which by its statutory standard mandates that each applicant is treated individually and each applicant for a waiver or deferral from payment must show both good cause and that the action would promote the public interest. Furthermore, the CFO explained in detail the reason for denying Petitioner’s Request, *i.e.*, Petitioner’s failure to provide “supporting documentation to establish a compelling case of financial hardship.”<sup>66</sup>

Petitioner’s burden was to demonstrate in the Request special circumstances that warrant a deviation from the general rule to collect the regulatory fee, and that the deviation will serve the public interest.<sup>67</sup> We explained that Petitioner failed the

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Congress consolidated federal bankruptcy law in the Bankruptcy Act of 1898. *See* Act of July 1, 1898, c. 541, 30 Stat. 544. At that time, bankruptcy law only facilitated liquidation. Not until 1933 did Congress amend the Bankruptcy Act to permit reorganization of certain entities. *See* Pub.L. No. 72-420, 47 Stat. 1474 (1933). In 1938, Congress amended the Bankruptcy Act with the precursor to Chapter 11 to facilitate general corporate reorganization. *See* Act of June 22, 1938, Pub.L. No. 74-575, 52 Stat. 840 (1938). Until Congress substantially revised the Bankruptcy Act with the Bankruptcy Reform Act of 1978, the Bankruptcy Act apparently referred to entities undergoing Chapter 7 liquidation as “bankrupts,” and those undergoing Chapter 11 reorganization as “debtors.” *See* S. REP. No. 989, 95th Cong., 2d Sess. 23 (1978), *reprinted in* Historical and Revision Notes following 11 U.S.C.A. § 101(12) at 36 (1979), *and reprinted in* 1978 U.S.C.C.A.N. 5787, 5809. But the Bankruptcy Reform Act of 1978 removed all references to “bankrupt” in federal bankruptcy law, created the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, and adopted “debtor” to refer to all who seek protection under the Code, whether they do so through liquidation under Chapter 7 or reorganization under Chapter 11. *See* 11 U.S.C. § 101 (12); *see generally* H.R. REP. No. 595, 95th Cong., 2d Sess. 3-5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965-66 (recounting Reform Act’s history and purpose).

<sup>64</sup> Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, 18 FCC Rcd 15985, 15989 ¶ 11 (2003).

<sup>65</sup> Federal Rule of Civil Procedure 66. *See Netsphere, Inc. v. Baron*, 703 F.3d 296, 306 (5th Cir. 2012); Wright & Miller, 12 Fed Prac. & Proc. Civ. § 2983 (2d ed.).

<sup>66</sup> Dismissal at 2.

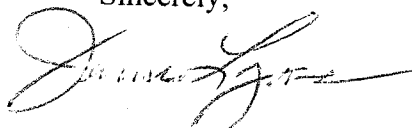
<sup>67</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1166 (D.C. Cir 1990) (“FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). However, as we instructed in *WAIT Radio*, those waivers must be founded upon an ‘appropriate general standard.’ We held that ‘sound administrative procedure contemplates waivers ... granted only pursuant to a relevant standard ... [which is] best expressed in a rule that obviates discriminatory approaches.’ 418 F.2d at 1159.”); 1994 *Report and Order*, 9 FCC Rcd at 5344 ¶ 29; *Phoenix Broadcasting, Inc. Stations KSWD and KPFN Seward, Alaska, Memorandum Opinion and Order*, 18 FCC Rcd 26464, 26446, ¶¶ 5-6 (2003) (“Fee relief may be granted based on asserted financial hardship, but only upon a documented showing that payment of the fee will adversely impact the licensee’s ability to serve the public. ... [I]n the absence of a documented showing of insufficient funds to pay the regulatory fees, [applicant] has not made a compelling showing that overrides the public interest in the Commission’s recouping the costs of its regulatory activities.”).

unambiguous standard set forth at 47 C.F.R. § 1.1166. Now, Petitioner first ignores our procedural rules to file the Petition and second fails to demonstrate a material error or omission in the CFO's decision. Petitioner's restated arguments that we previously considered and rejected do not establish grounds for reconsideration. As such, on the grounds discussed above, we deny the *Petition*.<sup>68</sup>

Petitioner remains delinquent in paying the FY 2011 regulatory fee, the statutory 25% penalty,<sup>69</sup> and charges provided for under 31 U.S.C. § 3717, and he is red lighted.<sup>70</sup>

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,



JBR Kathleen Heuer  
Chief Financial Officer

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<sup>68</sup> *WWIZ, Inc.*, 37 FCC at 686; *Infinity Broadcasting Operations, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 4216 (2004), *National Association of Broadcasters, Memorandum Opinion and Order*, 18 FCC Rcd 24414, 24415 ¶ 4 (Reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.).

<sup>69</sup> 47 U.S.C. § 159(c)(1).

<sup>70</sup> See 47 C.F.R. § 1.1910(b)(2) ("Action will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or request for authorization by any entity found to be delinquent in its debt to the Commission ..."); 47 C.F.R. § 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment.").

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 02 2017

OFFICE OF  
MANAGING DIRECTOR

Jacqueline R. Hankins, Esq.  
Marashlian & Donahue, PLLC  
The CommLaw Group  
1420 Spring Hill Road, Suite 401  
McLean, VA 22102

Licensee/Applicant: **Total Call International, Inc.**  
Refund/Waiver Request: Fiscal year (FY) 2012  
Regulatory Fee and Late Payment Charges  
Disposition: **Denied**  
(47 U.S.C. § 159(c)(1), 31 U.S.C. § 3717; 47 C.F.R.  
§§ 1.3, 1.1154, 1.1157, 1.1160, 1.1164, 1.1166)  
Fee: FY 2012 Regulatory Fee and Late Payment  
Penalties  
Station: N/A  
Dates of partial payment of Regulatory Fees: Sep.  
12, 2012, Mar. 23, 2013  
Date Payment and Penalty Paid: Dec. 23, 2015  
Date Request Filed: Dec. 23, 2015  
Fee Control No.: RROG-15-00016129

Dear Counsel:

This responds to Licensee's *Request*<sup>1</sup> for a refund or, in the alternative, a waiver of certain Fiscal Year (FY) 2012 fees and accrued charges the Commission imposed when Licensee failed to pay the correct fees by the due date. Specifically, under 47 C.F.R. § 1.1160, Licensee seeks a refund of the FY 2012 regulatory fees paid in March 2013, and the late penalties and interest paid in December 2015, which accrued when Licensee failed to pay the full fee by the

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<sup>1</sup> Letter from Jacqueline R. Hankins, Esq., Marashlian & Donahue, PLLC, 1420 Spring Hill Road, Suite 401, McLean, VA 22102 to Marlene H. Dortch, FCC, Office of the Secretary, 445 12<sup>th</sup> St., SW, Room TW A-325, Washington, DC 20554 (Attn: Office of the Managing Director) (Dec. 23, 2015) (*Confidential Treatment Request*), letter from Jacqueline R. Hankins, Esq., Marashlian & Donahue, PLLC, 1420 Spring Hill Road, Suite 401, McLean, VA 22102 to Marlene H. Dortch, FCC, Office of the Secretary, 445 12<sup>th</sup> St., SW, Room TW A-325, Washington, DC 20554 (Attn: Office of the Managing Director) (Dec. 23, 2015) (*Request*) with Exhibit A, 2012 FCC Form 499-A, Telecommunications Reporting Worksheet (Reporting 2011 Revenues) (Apr. 2, 2012) (Original) (*Original 2012 499-A*), Exhibit B, 2012 FCC Form 499-A, Telecommunications Reporting Worksheet (Reporting 2011 Revenues) (Apr. 2, 2012) (Revised) (*Revised 2012 499-A*), Exhibit C, 2012 FCC Form 499-A, Telecommunications Reporting Worksheet (Reporting 2011 Revenues) (Dec. 27, 2012) (*Second Revised 2012 499-A*), Exhibit D, Bank of America, Merrill Lynch, Payment Details Report, Run Date, 12/23/2015, Fax Cover Sheet, 2015-12-23, Total Call International-Request for Refund or Waiver of Regulatory Fees and Penalties with *Confidential Treatment Request*, Request, FCC Remittance Advice, Bill for Collection (12/23/2015), FCC Form 159-W, Interstate Telephone Service Provider Worksheet Version 1 of 3, (*ITSP Worksheet vers. 1*), FCC Form 159-W, Interstate Telephone Service Provider Worksheet Version 2 of 3, (*ITSP Worksheet vers. 2*), FCC Form 159-W, Interstate Telephone Service Provider Worksheet Version 3 of 3, (*ITSP Worksheet vers. 3*).

announced deadline or, in the alternative, under 47 C.F.R. § 1.1166, Licensee asks for a waiver of the fees, penalties, and interest. As we discuss below, we deny the *Request* because Licensee fails to demonstrate a basis for refund<sup>2</sup> or, in the alternative, either legal grounds or most extraordinary circumstances to waive collection of the penalty and assessed charges of collection, or good cause and that the public interest is served to waive the fee.<sup>3</sup>

### *Background*

On April 2, 2012, Licensee submitted a FCC Form 499-A reporting as of the end of calendar year (CY) 2011 it had limited interstate and international end-user telecommunications revenues. Later, using Licensee's information, the Commission pre-completed the ITSP worksheet that showed \$463.00 in fees,<sup>4</sup> and Licensee paid that amount. On September 29, and December 27, 2012, Licensee submitted two revised FCC Forms 499-A,<sup>5</sup> which reported substantially different amounts in end-user telecommunications revenues.<sup>6</sup> As a result of the change, Licensee was required to pay a greater annual regulatory fee amount, and pay a penalty on any portion unpaid after September 13, 2012.

Under 47 U.S.C. § 159 and the Commission's rules, the Commission is required to "assess and collect regulatory fees" to recover the costs of the Commission's regulatory activities,<sup>7</sup> and when the required payment is received late or it is incomplete, to assess a penalty equal to "25 percent of the amount of the fee which was not paid in a timely manner."<sup>8</sup>

On July 19, 2012, the Commission released Assessment and Collection of Regulatory Fees for Fiscal Year 2012, *Report and Order*, 27 FCC Rcd 8390 (2012) (*FY 2012 Fee Order*) establishing FY 2012 annual regulatory fee payment requirements, including those applicable to Licensee as an Interstate Telecommunications Service Provider (ITSP). In relevant part, the *FY 2012 Fee Order* established that Licensee was required to pay "a regulatory fee of \$.00375 per revenue dollar."<sup>9</sup> Thereafter, on August 13, 2012, the Commission released Payment Methods and Procedures For Fiscal Year 2012 Regulatory Fee, *Public Notice* (DA 12-1294, Aug. 13, 2012) (*Public Notice*) informing Licensee that the required payment must be received no later than 11:59 PM, ET, September 13, 2012.<sup>10</sup> That *Public Notice* reminded Licensee of the available Fact Sheet pertinent to ITSP annual fees and that

It is the responsibility of the licensee to determine the fullest extent of their regulatory fee obligation. When you enter Fee Filer, fee information associated with your FRN will be presented. You may make adjustments, corrections, additions, or

<sup>2</sup> 47 C.F.R. § 1.1160(a)(1) & (3).

<sup>3</sup> 47 C.F.R. §§ 1.1160, 1.1164, 1.1166.

<sup>4</sup> *Request* at 2; *Original 2012 499-A*.

<sup>5</sup> *Request* at 2; *Revised 2012 499-A*; *Second Revised 2012 499-A*.

<sup>6</sup> *Id.* Compare *Original 2012 499-A* with *Revised 2012 499-A* and *Second Revised 2012 499-A*.

<sup>7</sup> 47 U.S.C. § 159(a)(1); 47 C.F.R. § 1.1151.

<sup>8</sup> 47 U.S.C. § 159(c)(1); 47 C.F.R. §§ 1.1157(c)(1), 1.1164 ("[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee ... which was not paid in a timely manner.").

<sup>9</sup> *FY 2012 Fee Order*, 27 FCC Rcd at 8393, ¶ 9; 47 C.F.R. §§ 1.1154, 1.1157(b)(1).

<sup>10</sup> <https://www.fcc.gov/document/payment-and-procedures-public-notice-fy-2012-regulatory-fees>.

deletions to this information presented, if necessary. Please note that you are required to report and pay for all regulatory fees that you owe, regardless of whether those fees are presented through this feature.

*Public Notice* at 3. The *Public Notice* referred ITSP fee payors to the *Fact Sheet: What You Owe- Interstate Telecommunications Service Providers for FY 2012*<sup>11</sup> (*Fact Sheet*) which stated in part,

### Corrections to ITSP Worksheet

After logging into Fee Filer, you will have an opportunity to edit your pre-completed ITSP worksheet. Upon completion of your edits, you will have an opportunity to pay electronically or generate a Form 159-E "Remittance Advice" voucher which you can use to mail in along with your payment. **PLEASE**

**NOTE:** Please note that if you revise your Form 159-W worksheet, it is your responsibility to file a revised 499-A form with USAC. Until this revised 499-A form is filed with USAC, the Commission will continue to use the 499-A form upon which the regulatory fee bill was created as the official regulatory fee amount due.

*Fact Sheet* at 4. The *Fact Sheet* included as part of the Frequently Asked Questions portion, the question and answer, "**Should a carrier make a regulatory fee payment if it has not filed an FCC Form 499-A?** Yes. If a telecommunications or Interconnected VoIP service provider offered interstate telecommunications services in 2011, then it should have filed an FCC Form 499-A, and it must also pay the appropriate regulatory fee payment."<sup>12</sup> The *Fact Sheet* included a point of contact telephone number and a copy of the FCC Form 159-W from which to calculate the FY 2012 regulatory fee.

The Commission's records, and Licensee's submission, show that on July 28, 2011, October 28, 2011, January 26, 2012, and March 2, 2012, Licensee filed FCC Form 499-Q Telecommunications Reporting Worksheets to report billed revenues for calendar year 2011, and that on April 2, September 29, and December 27, 2012, respectively, Licensee filed an initial and two revised versions of FCC Form 499-A.<sup>13</sup> The revised FCC Forms 499-A reported substantial differences in revenues,<sup>14</sup> e.g., in the first revision, Licensee increased its total interstate and international end-user revenues by about 73,000%, then, in the second revision, Licensee decreased the amount in that initial revision by 36% to report a new total interstate and international end-user revenues that was 46,700% higher than the first-filed 2012 FCC Form 499-A.<sup>15</sup>

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<sup>11</sup> <https://www.fcc.gov/document/fy-2012-itsp-regulatory-fees-fact-sheet>.

<sup>12</sup> *Fact Sheet* at 6.

<sup>13</sup> *Request* at 2, *Original 2012 499-A*, *Revised 2012 499-A*, and *Second Revised 499-A*.

<sup>14</sup> E.g., compare at *Original 2012 499-A*, *Revised 2012 499-A*, and *Second Revised 499-A* information at lines 309, 311, 315, 411, 411, 414.1, 414.2, 418.3, 419, 420, 421, 422, 423, 512, and 514.

<sup>15</sup> Compare *ITSP Worksheet vers. 1* with *ITSP Worksheet vers. 2* and *ITSP Worksheet vers. 3*.



On September 10, 2012, Licensee paid \$463.00 toward its FY 2012 regulatory fees;<sup>16</sup> however, it delayed until March 12, 2013, to pay additional amounts toward the fee corresponding to the CY 2011 revenues reported later on two revised 2012 FCC Forms 499-A. Licensee made that March 12, 2013, partial payment only after it received a demand. Thereafter, Licensee continued in a delinquent status until December 23, 2015. Even so, the Commission credited each of these payments toward the delinquent account.

Also on December 23, 2015, Licensee submitted its *Confidential Treatment Request* and *Request* seeking a “refund of [the] fees, penalties and interest per 47 C.F.R. § 1.1160[ or, i]n the alternative ... a waiver of these fees, penalties and interest pursuant to 47 C.F.R. § 1.1166.”<sup>17</sup> Licensee asserts, it paid the regulatory fee based on the *Original 2012 499-A*, and it acknowledges that on September 29, 2012, and December 27, 2012, it filed revisions resulting in “upward adjustments” from the *Original 2012 499-A*. Moreover, in the *Request*, Licensee acknowledges it failed to pay the additional amount then or after “[t]he Commission recalculated regulatory fees owed based upon the first revised filing, and again after [Licensee] submitted its second revision.”<sup>18</sup> Rather, on March 12, 2013, Licensee made an additional partial payment based on the revenue amount reported in *Second Revised 2012 499-A*, and Licensee “did not pay [the amount equal to] the outstanding penalties (late fees and interest).”<sup>19</sup> Licensee acknowledges “[i]nterest ... continued to accrue since January 2013.”<sup>20</sup>

Licensee, asserts, the “recalculation of fees due outside the regulatory fee payment period violates the FCC’s own payment procedures”<sup>21</sup> based on Licensee’s interpretation of the *Fact Sheet* statement of warning that “[t]he ITSP bill that will be accessible in Fee Filer is based on information ... provided on FCC Form 499-A, which was due on April 1, 2012, and includes updates processed through July 23, 2012.”<sup>22</sup> From that, Licensee asserts, because its *Original 2012 499-A* was “processed ‘through July 23, 2012’ [and its revisions] were not even filed [before] September 29 and December 27, 2012,”<sup>23</sup> the recalculation “violated ... publicly noticed regulatory fee assessment procedures, and thereby, the APA [Administrative Procedure Act].”<sup>24</sup> Hence, under “47 C.F.R. § 1.1160, the Commission should ... refund the 2012 regulatory fee payment [Licensee] made in March 2013.”<sup>25</sup> Licensee asserts the existence of “good cause for a waiver [because] the public interest cannot support an assessment of fees contrary to ... publicly noticed payment procedures.”<sup>26</sup>

In the alternative, Licensee asserts, “the Commission should ... refund the late penalties and interest” because Licensee “had no opportunity to ‘timely’ make a payment on the basis of

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<sup>16</sup> See *ITSP Worksheet vers. 1*.

<sup>17</sup> *Request* at 1.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, *Fact Sheet* at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.*

its first or second revised Form[s 499-A],”<sup>27</sup> and “good cause exists to waive the ... penalty [because that] penalty would not have attached but for the Commission’s re-calculation of the principal balance in violation of its own payment procedures.”<sup>28</sup> Furthermore, Licensee claims it “could not possibly have timely paid the underlying principal,” hence “the public interest does not support assessment of [the] penalty.”<sup>29</sup> Finally, Licensee summarizes its position that the Commission’s recalculation of Licensee’s fees after July 23, 2012, violated “publicly noticed ... procedures,”<sup>30</sup> hence the Commission should refund the “full amount of [Licensee’s] 2012 regulatory fee payment ... along with [Licensee’s] payment of late fees and interest ....”<sup>31</sup>

### *Standards*

Licensees are expected to know the Commission’s rules and procedures,<sup>32</sup> including those for paying the annual regulatory fees, filing a timely and complete petition to defer payment, and filing a request for waiver. Also, Licensees are expected to know the consequences of failing to pay an annual regulatory fee in a timely manner.

In establishing the regulatory fee program mandated by Congress,<sup>33</sup> the Commission set out the relevant schedules of the annual fees<sup>34</sup> and established procedures for, among other matters, payment, waivers, reductions, and deferral, refunds, error claims, and penalties.<sup>35</sup>

Under 47 U.S.C. § 159 and the Commission’s rules, we are required to “assess and collect regulatory fees”<sup>36</sup> to recover the costs of the Commission’s regulatory activities,<sup>37</sup> and when the required payment is received late or it is incomplete, and “not excused by bank error, [to assess] a 25 percent penalty of the amount of the fee ... which [is] not paid in a timely manner.”<sup>38</sup> As set forth in the *FY 2012 Fee Order*, the regulatory fee for ITSP service providers was set at “\$.00375 per revenue dollar.”<sup>39</sup> A timely fee payment is one received at the Commission’s lockbox bank by the due date.<sup>40</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1.

<sup>32</sup> 47 C.F.R. § 0.406; *see* Life on the Way Communications, Inc., *Forfeiture Order* 30 FCC Rcd 2603, 2607 (2015).

<sup>33</sup> *See* 47 C.F.R. § 1.1151.

<sup>34</sup> *See e.g.*, 47 C.F.R. § 1.1154.

<sup>35</sup> *See* 47 C.F.R. Part 1, Subpart G.

<sup>36</sup> *FY 2012 Fee Order*; *see also e.g.*, Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812 (2011) (*2011 Regulatory Fee Order*).

<sup>37</sup> 47 U.S.C. § 159(a)(1); 47 C.F.R. § 1.1151.

<sup>38</sup> 47 U.S.C. § 159(c)(1); 47 C.F.R. §§ 1.1157(c)(1), 1.1164.

<sup>39</sup> *FY 2012 Fee Order*, 27 FCC Rcd at 8393, ¶ 9; 47 C.F.R. §§ 1.1154, 1.1157(b)(1). *See* Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14491-92, ¶ 31 (2000) (“beginning in FY 2000, we are requiring that the interstate and international telephone services regulatory fee be derived from interstate and international end-user revenues as submitted by providers on FCC Form 499-A, Telecommunications Reporting Worksheet, as part of the telecommunications provider reporting requirements.”); Assessment and Collection of Regulatory Fees for Fiscal Year 2008, *Report and Order*, 24 FCC Rcd 6388, 6404, ¶¶ 38-39 (2008) (*2008 Fee Order*) (“The FCC Form 499-A is filed each year on April 1 with the interstate revenues from the previous year; the ITSP regulatory fee is based on billed interstate and international end-user revenues. ... Carriers were required in FY 1995 to multiply their adjusted gross revenues ... by 0.00088 to determine the appropriate

Each year, the Commission establishes the final day on which payment must be received before it is considered late, *i.e.*, a deadline after which the Commission must assess charges that include the statutory late payment penalty required by 47 U.S.C. § 159(c)(1) and 47 C.F.R. §§ 1.1157(c)(1) and 1.1164, and additional charges of interest, penalties, and charges of collection required by 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940.<sup>41</sup> For FY 2012, the deadline for paying regulatory fees was September 13, 2012.<sup>42</sup>

Under 47 C.F.R. § 54.711, contributors such as Licensee are required to file the Telecommunications Reporting Worksheet, FCC Forms 499-Q and 499-A, quarterly and annually. Inaccurate or untruthful information in the Telecommunications Reporting Worksheet may lead to prosecution under Title 18, United States Code. As such, the Commission's rules require that an executive officer of the contributor certify the truth and accuracy of the historical information<sup>43</sup> and any projections, and that the contributor retain necessary records to demonstrate rule compliance, and provide that the contributor may be audited.<sup>44</sup> The Commission has access to all data reported by the Licensee.<sup>45</sup> Instructions to complete the FCC Form 499-A worksheet include, in part, admonitions that a contributor is obligated to file revisions, if there is any change in certain listed types of information and that "Filers must also submit revised worksheets if they discover an error in their revenue data." Since companies generally close their books for financial purposes by the end of March, such filers should base the April filing on closed books."<sup>46</sup>

Under 47 U.S.C. § 159(c)(1), if the full amount is not received at the Commission's lockbox bank by the due date, a late payment penalty of 25 percent of the amount not paid accrues automatically. Specific to payment and penalties, "[a]ny late filed regulatory fee payment will be subject to the penalties set forth in section 1.1164,"<sup>47</sup> which provides in relevant part, "[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee ... not paid in a timely

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regulatory fee."); Assessment and Collection of Regulatory Fees for Fiscal Year 2010, *Report and Order*, 25 FCC Rcd 9278, 9288, ¶ 26 (2010) ("ITSP regulatory fees are based on revenues, with ITSP providers paying a regulatory fee on each dollar of revenue generated from both interstate and international revenues."); Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10818, ¶ 14 ("the action we take today will result in an ITSP fee rate of \$.00375 per revenue dollar ... the FY 2011 ITSP regulatory fee rate is \$.00375 per revenue dollar.").

<sup>40</sup> 47 C.F.R. § 1.1164.

<sup>41</sup> *FY 2012 Fee Order*, 27 FCC Rcd at 8399, ¶ 31 ("administrative processing charges will be assessed on any delinquent regulatory fee, in addition to the 25 percent late charge penalty. In case of partial payments (underpayments) of regulatory fees, the payor will be given credit for the amount paid, but if it is later determined that the fee paid is incorrect or not timely paid, then the 25 percent late charge penalty (and other charges and/or sanctions, as appropriate) will be assessed on the portion that is not paid in a timely manner.).

<sup>42</sup> See FY 2012 Regulatory Fees Due No Later Than September 13, 2012, *Public Notice*, DA 12-1295 (Aug. 13, 2012).

<sup>43</sup> 47 C.F.R. § 54.711(a).

<sup>44</sup> 47 C.F.R. §§ 54.706, 54.707, 54.711.

<sup>45</sup> 47 C.F.R. § 54.711(b).

<sup>46</sup> 2012 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A), March 2012, p.7-8 (*FCC Form 499-A Instructions*).

<sup>47</sup> 47 C.F.R. § 1.1157(c)(1).

manner.”<sup>48</sup> Thus, after the deadline, the full amount due includes the late payment penalty<sup>49</sup> and, if the debt remains unpaid, charges of collection, interest, and penalties.<sup>50</sup> If a regulatee tenders less than the full amount owed, it is a partial payment, which is applied to the amount owed as set forth in 47 C.F.R. § 1.1940(f)—first to the penalties and accrued charges, and then to the principal amount owed.<sup>51</sup> Afterwards, any unpaid portion is a delinquent regulatory fee that incurs interest, penalties, and charges of collection under 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940. Moreover, until the full amount is paid or satisfactory arrangements are made, the licensee remains a delinquent debtor subject to the Commission’s administrative sanctions of dismissal as set forth at 47 C.F.R. §§ 1.1164(e)<sup>52</sup> and 1.1910.

Under 47 C.F.R. §§ 1.1160(a) and 1.1166, a refund may be made only under specific circumstances, e.g., “[w]hen no regulatory fee is required or an excessive fee has been paid” or “[w]hen a waiver is granted in accordance with § 1.1166.”<sup>53</sup> Under § 1.1166, fees may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest.<sup>54</sup> An applicant seeking a waiver of the penalty and assessed charges has the burden of demonstrating compelling and “most extraordinary circumstances”<sup>55</sup> to justify waiver of the penalty.

### Discussion

As Licensee has it framed, the *Request* under 47 C.F.R. § 1.1160 or § 1.1166 seeking a refund of all the amounts it paid after September 10, 2012, or, in the alternative, a waiver of the annual regulatory fee and penalties does not present valid grounds for relief. Specifically, a refund is appropriate under only limited circumstances,<sup>56</sup> such as where either (a) no fee is due or (b) a waiver of the fee has been granted as provided for at 47 C.F.R. § 1.1166,<sup>57</sup> which requires a showing of both good cause and that the waiver would promote the public interest. Licensee failed to establish either ground.

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<sup>48</sup> 47 C.F.R. § 1.1164.

<sup>49</sup> *Id.*

<sup>50</sup> 31 U.S.C. § 3717.

<sup>51</sup> 47 C.F.R. §§ 1.1940(f) (“When a debt is paid in partial ... payments, amounts received ... shall be applied first to outstanding penalties and administrative cost charges, second to accrued interest, and third to the outstanding principal.”), 1.1157(c)(1), 1.1164(c).

<sup>52</sup> 47 C.F.R. §§ 1.1164(e) (“Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee .... The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment.”), 1.1910.

<sup>53</sup> 47 C.F.R. § 1.1160(a)(1) & (3).

<sup>54</sup> 47 C.F.R. § 1.1166 (“fees established by sections 1.1152 through 1.1156 may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest.”); *cf.* 47 C.F.R. § 1.3.

<sup>55</sup> McLeodUSA Telecommunications Services, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 6587, 6589, ¶ 8 (2004) (*McLeodUSA Telecommunications*) (denying the request for waiver of 25 percent penalty).

<sup>56</sup> 47 C.F.R. § 1.1160 (“(a) Regulatory fees will be refunded, upon request, only in the following instances: (1) When no regulatory fee is required or an excessive fee has been paid. In the case of an overpayment, the refund amount will be based on the applicants’, permittees’, or licensees’ entire submission. ... (3) When a waiver is granted in accordance with § 1.1166.”)

<sup>57</sup> 47 C.F.R. § 1.1166 (“fees ... may be waived ... on a case-by-case basis, where good cause is shown and where waiver ... would promote the public interest.”).

Licensee failed to establish no fee is due.

Looking first to 47 C.F.R. § 1.1160(a)(1), we find that Licensee failed to establish a basis for a refund by asserting no fee is due. Licensee agrees that it is legally obligated to pay an ITSP annual regulatory fee; however, it presents the theory that it has not obligation to pay a fee greater than an amount based on an incorrect revenue report on April 2, 2012, because it waited until after July 23, 2012, to submit the two revisions. The crux of Licensee's *Request* is a novel and unsupported supposition that the Commission violated its own "regulatory fee calculation and payment procedures" by requiring Licensee to pay fees based on its "revised ... end-user interstate and international telecommunications revenue [and increased by] a late filing penalty (25% of the outstanding principal balance) [and] interest."<sup>58</sup> Specifically, "recalculation of fees [after the date] of the regulatory fee payment period violates the FCC's own payment procedures[, because t]he ... Fact Sheet provides that 'The ITSP bill ... accessible in Fee Filer is based on information ... provided on FCC Form 499-A ... and includes updates processed through July 23, 2012.'"<sup>59</sup> Licensee opines that the *Fact Sheet* establishes the relevant regulatory fee cannot be calculated from a revision submitted after July 23, 2012, because that process would violate APA notice requirements at 5 U.S.C. § 553.<sup>60</sup> Licensee is wrong.

First, the annual regulatory fee is not established by the *Fact Sheet*, rather it mandated by 47 U.S.C. § 159, the Commission's rules at 47 C.F.R. § 1.1151, *et seq.*, and the *FY 2012 Fee Order*. Hence a fee calculation based on accurate revenue data does not violate payment procedures. Indeed, the *FY 2012 Fee Order* sets the ITSP service providers was set at "\$.00375 per revenue dollar,"<sup>61</sup> which is what was done in this case from Licensee's most accurate certified revenue report as of December 31, 2011. Plainly, to examine that process, the *FY 2012 Fee Order* complies fully with 5 U.S.C. § 553(b), *i.e.*, publication in the Federal Register at 77 FR 46307-01 (Aug. 3, 2012).<sup>62</sup> Moreover, the standards for payment and sanctions for not paying are clear; the Commission assesses and collects regulatory fees to recover the costs of the

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<sup>58</sup> *Request* at 2.

<sup>59</sup> *Id.*

<sup>60</sup> 5 U.S.C. § 553(b) provides in part that "General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law," except the section does not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."

<sup>61</sup> *FY 2012 Fee Order*, 27 FCC Rcd at 8393, ¶ 9; 47 C.F.R. §§ 1.1154, 1.1157(b)(1). *See* Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14491-92, ¶ 31 (2000) ("beginning in FY 2000, we are requiring that the interstate and international telephone services regulatory fee be derived from interstate and international end-user revenues as submitted by providers on FCC Form 499-A, Telecommunications Reporting Worksheet, as part of the telecommunications provider reporting requirements."); *FY 2008 Fee Order*, 24 FCC Rcd at 6404, ¶¶ 38-39 ("The FCC Form 499-A is filed each year on April 1 with the interstate revenues from the previous year; the ITSP regulatory fee is based on billed interstate and international end-user revenues. ... Carriers were required in FY 1995 to multiply their adjusted gross revenues ... by 0.00088 to determine the appropriate regulatory fee."); Assessment and Collection of Regulatory Fees for Fiscal Year 2010, *Report and Order*, 25 FCC Rcd 9278, 9288, ¶ 26 (2010) ("ITSP regulatory fees are based on revenues, with ITSP providers paying a regulatory fee on each dollar of revenue generated from both interstate and international revenues."); Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10818, ¶ 14 ("the action we take today will result in an ITSP fee rate of \$.00375 per revenue dollar ... the FY 2011 ITSP regulatory fee rate is \$.00375 per revenue dollar.").

<sup>62</sup> *See also* Assessment and Collection of Regulatory Fees for Fiscal Year 2012, *Notice of Proposed Rulemaking*, 27 FCC Rcd 5539 (2012) (77 FR 29275-02 (May 17, 2012)).

Commission's regulatory activities,<sup>63</sup> and when the required payment is received late or it is incomplete, and "not excused by bank error, [the Commission assesses] a 25 percent penalty of the amount of the fee ... which [is] not paid in a timely manner."<sup>64</sup> A timely fee payment is one received at the Commission's lockbox bank by the due date.<sup>65</sup> When payment is late, the Commission assesses charges that include the statutory late payment penalty required by 47 U.S.C. § 159(c)(1) and 47 C.F.R. §§ 1.1157(c)(1) and 1.1164, and additional charges of interest, penalties, and charges of collection required by 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940.

Next, Licensee is wrong in asserting that the *Fact Sheet* limits the fee calculation to Licensee's erroneous data reported on the *Original 2012 499-A*. Rightly, the fee is calculated from the accurate report of revenue dollars. Furthermore, although subject to FCC verification, in the first instance, the calculation is accomplished by the licensee. Indeed, in the *FY 2008 Fee Order* the Commission explained the procedural mechanism that "Carriers were required in FY 1995 to multiply their adjusted gross revenues ... by 0.00088 to determine the appropriate regulatory fee."<sup>66</sup> That procedure carries forward. Accordingly, Licensee's task simply was to determine accurately its revenue total as of the last day of the prior calendar year and multiply that dollar amount by the specified rate in the *FY 2012 Fee Order*. Instead, Licensee asserts it was unable to determine in September of 2012 its annual revenue as of December 31, 2011.

Third, the *Fact Sheet* does not alter the *FY 2012 Fee Order*, and the *Fact Sheet* does not require a calculation based on erroneous and uncorrected revenue information submitted before July 23, 2012. That approach strains logic and the plain meaning of warning to licensees that the pre-completed ITSP worksheet had not been adjusted to include a revision (greater or lesser amounts) after July 23, 2012. This fair warning is entirely consistent with the repeated admonishments in both the *Public Notice*<sup>67</sup> (licensees have "the responsibility ... to determine the fullest extent of their regulatory fee obligation[, to] make adjustments, corrections, additions, or deletions to this information presented, if necessary[, and] to report and pay for all regulatory fees that [they] owe, regardless of whether those fees are presented through this feature"<sup>68</sup>) and other portions of the *Fact Sheet*<sup>69</sup> ("[a]fter logging into Fee Filer, [licensees] will have an opportunity to edit [their] pre-completed ITSP worksheet [and] to pay electronically or generate a Form 159-E 'Remittance Advice' voucher which you can use to mail in along with your payment. ... **PLEASE NOTE:** Please note that if you revise your Form 159-W worksheet, it is your responsibility to file a revised 499-A form with USAC"<sup>70</sup>). Furthermore, the *Fact Sheet* references *FCC Form 499-A Instructions*,<sup>71</sup> which admonishes filers that they "must ... submit revised worksheets if they discover an error in their revenue data."<sup>72</sup> Finally, Licensee offers no valid legal authority for the fanciful theory that a licensee may avoid paying a proper fee simply by under-reporting its annual revenues and failing to correct the error before the fee payment

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<sup>63</sup> 47 U.S.C. §159(a)(1); 47 C.F.R. § 1.1151.

<sup>64</sup> 47 U.S.C. §159(c)(1); 47 C.F.R. §§ 1.1157(c)(1), 1.1164.

<sup>65</sup> 47 C.F.R. § 1.1164.

<sup>66</sup> *FY 2008 Fee Order*, 24 FCC Rcd at 6404, ¶¶ 38-39.

<sup>67</sup> <https://www.fcc.gov/document/payment-and-procedures-public-notice-fy-2012-regulatory-fees>.

<sup>68</sup> *Public Notice* at 3.

<sup>69</sup> <https://www.fcc.gov/document/fy-2012-itsp-regulatory-fees-fact-sheet>.

<sup>70</sup> *Fact Sheet* at 4.

<sup>71</sup> *Id.* at 5.

<sup>72</sup> *FCC Form 499-A Instructions* at 8.

date. Licensee has not established a basis for refund under 47 C.F.R. § 1.1160 on the ground that no fee is due. We turn now to whether Licensee has established the alternative basis for refund on the ground that it should receive a “waiver ... in accordance with §1.1166.” It has not.

Licensee failed to establish grounds for a waiver.

In the alternative, Licensee asserts a waiver is appropriate because (a) “good cause for a waiver [exists because] the public interest cannot support an assessment of fees contrary to ... publicly noticed payment procedures,”<sup>73</sup> and (b) “the Commission should ... refund the late penalties and interest” because Licensee “had no opportunity to ‘timely’ make a payment on the basis of its first or second revised Form[s] 499-A.”<sup>74</sup> “[G]ood cause exists to waive the ... penalty [because that] penalty would not have attached but for the Commission’s re-calculation of the principal balance in violation of its own payment procedures.”<sup>75</sup> Continuing, Licensee claims it “could not possibly have timely paid the underlying principal,” hence “the public interest does not support assessment of [the] penalty.”<sup>76</sup> We disagree.

First, the public interest does not support Licensee’s theory. The Commission’s authority both to collect the regulatory fees when due, and later to demand payment of the delinquent fee plus the statutory penalty and charges of collection is based on statutes, regulations, and administrative rulemaking.<sup>77</sup> The public interest supports compliance with the law, and here the Commission’s demand that Licensee pay the FY 2012 regulatory fee based on Licensee’s revised reported CY 2011 revenues complies with the law that includes the *FY 2012 Fee Order* and 47 C.F.R. § 1.1154, which require Licensee to pay “a regulatory fee of \$.00375 per revenue dollar.”<sup>78</sup> The public interest does not support Licensee’s underpayment based on its erroneous *Original 2012 499-A*. Indeed, the *Public Notice*<sup>79</sup> admonishes Licensee that it had “the responsibility ... to determine the fullest extent of [its] regulatory fee obligation[, and to] make adjustments, corrections, additions, or deletions to this information presented, if necessary[, and] that [Licensees] are required to report and pay for all regulatory fees that [they] owe, regardless of whether those fees are presented through this feature.”<sup>80</sup> Further, the *Fact Sheet*<sup>81</sup> admonishes regulatees that “[a]fter logging into Fee Filer, [licensees] will have an opportunity to edit [their] pre-completed ITSP worksheet [and] to pay electronically or generate a Form 159-E ‘Remittance Advice’ voucher which you can use to mail in along with your payment.”<sup>82</sup> Licensee was warned, “**PLEASE NOTE:** Please note that if you revise your Form 159-W worksheet, it is your responsibility to file a revised 499-A form with USAC.”<sup>83</sup> Moreover, the *FCC Form 499-A Instructions*<sup>84</sup> admonished filers that they “must ... submit revised worksheets if they discover an

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 31 U.S.C. §§ 3701, 3711, 3717, 47 U.S.C. § 159; 47 C.F.R. §§ 1.1151, 1.1154, 1.1157(b)(1).

<sup>78</sup> *FY 2012 Fee Order*, 27 FCC Rcd at 8393, ¶ 9; 47 C.F.R. §§ 1.1154, 1.1157(b)(1).

<sup>79</sup> <https://www.fcc.gov/document/payment-and-procedures-public-notice-fy-2012-regulatory-fees>.

<sup>80</sup> *Public Notice* at 3.

<sup>81</sup> <https://www.fcc.gov/document/fy-2012-itsp-regulatory-fees-fact-sheet>.

<sup>82</sup> *Fact Sheet* at 4.

<sup>83</sup> *Fact Sheet* at 4.

<sup>84</sup> *Id.* at 5.

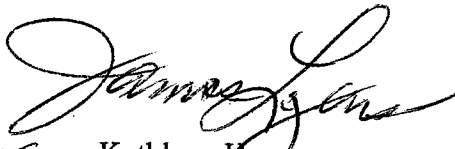
error in their revenue data.”<sup>85</sup> These warnings, admonitions, and instructions rebut Licensee’s unsupported assertion that the public interest supports understating revenues on the FCC Form 499-A or underpaying a fee based on erroneous information. The essential facts are undisputed—Licensee erred in its first and second-filed FCC Forms 499-A, and Licensee knew it underpaid its annual regulatory fee well before the Commission sent the demand letter. As such, the scenario does not establish both required elements for a waiver under 47 C.F.R. § 1.1166—good cause and that the public interest is served.<sup>86</sup> The penalty required by 47 U.S.C. § 159(c)(1) and charges required by 31 U.S.C. § 3717 are not limited to situations where the failure to pay was knowing or willful. Indeed, neither the statute nor the Commission’s regulations contemplates a waiver of or reduction in the late payment penalty based on matters such as an employee’s inability to perform duties, the amount of time after the deadline within which the regulatee satisfies its payment obligations, or the absence of a reminder notice. Here, Licensee created the error.

We deny Licensee’s *Request* for a refund or, in the alternative, a waiver.

Licensee requested confidential treatment of the submitted financial data. Under 47 C.F.R. §§ 0.442(d)(1) and 0.459(d)(3), we do not routinely rule on requests for confidential treatment until we receive a request for access to the records; however, in the meantime, we treat the records confidentially.

If you have any questions concerning this matter, please call the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,

  
For: Kathleen Heuer  
Chief Financial Office

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<sup>85</sup> FCC Form 499-A Instructions at 8.

<sup>86</sup> See 47 C.F.R. § 1.3; see also *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990); accord *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (stating that in addition to the public interest being well-served, there must also be a sufficiently “unique situation” to grant waiver).



FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

DEC 8 2016

OFFICE OF  
MANAGING DIRECTOR

David Tillotson, Esq.  
4606 Charleston Terrace, N.W.  
Washington, DC 20007

Licensee/Applicant: **Waller Broadcasting, Inc.**  
Deferral of Regulatory Fees, Financial Hardship  
Disposition: **Dismissed and Denied** (47 U.S.C. §  
159; 47 C.F.R. §§ 1.65, 1.1157, 1.1164, 1.1166, and  
1.1910)  
Station(s): KLJT  
Fee: Fiscal Year (FY) 2016 Regulatory Fees  
Date Request Submitted: Sep. 12, 2016  
Date Regulatory Fee Paid: Not paid  
Fee Control No.: RROG 16-00016207  
Amount Due: *See Fee Filer and Contact the  
Bureau of the Fiscal Service, U.S. Treasury*

Dear Counsel:

This responds to Licensee's *Request*<sup>1</sup> for a 120-day deferral of payment of the required Fiscal Year (FY) 2016 regulatory fee due for Station KLJT. As we discuss below, we dismiss because Licensee is delinquent in paying a prior year required annual regulatory fee<sup>2</sup> and, in the alternative, because Licensee failed to include the necessary financial documentation to support a petition to defer payment based on financial hardship. Furthermore, we deny the *Request* because Licensee failed to demonstrate good cause and that the public interest will be served. Because we dismiss and deny the petition for deferral, effective September 27, 2016, the unpaid FY 2016 regulatory fee was delinquent; accordingly, we assessed the statutory penalty of 25% of the unpaid amount, and debt collection charges required by 31 U.S.C. § 3717. This is a demand for payment and notification that Licensee remains redlighted.

*Background*

On September 12, 2016, we received Licensee's *Request*, which in relevant part "request[ed] pursuant to Section 1.116 (sic) of the Commission's rules a 120 day deferral of its obligation to pay KLJT's FY 2016 annual regulatory fee."<sup>3</sup> Licensee asserted, its "President and controlling stockholder ... died this past June ... the Executrix ... found the Station to be in such poor financial condition that [Licensee] was forced to [go] off the air ... [a]t the present time,

<sup>1</sup> Waller Broadcasting, Inc., Request for Deferral of FY 2016 Regulatory Fees for Station KLJT, Facility ID 1548, Jacksonville, TX, Request for Deferral of FY 2016 Regulatory Fees (Sep. 7, 2016, *rec'd* Sep. 12, 2016) (*Request*).

<sup>2</sup> The Commission's records show that Waller Broadcasting Inc. is delinquent in paying a regulatory fee from FY 2014.

<sup>3</sup> *Request*.

[Licensee] does not have the cash available ... to pay the ... Fee or ... means to raise the needed cash ... the Executrix has entered into a letter of intent for such a sale ... expect[ed] to be ... complete[d] before the end of [2016], at which time [Licensee] will be able to pay the ... Fee.”<sup>4</sup> Licensee did not include supporting documentation, e.g., a copy of the letter of intent, notification of silence status, or financial documentation. We note that Licensee’s separate application to transfer control<sup>5</sup> includes some information inconsistent with the representations in the *Request*. For example, the FCC 316 includes the statement, “THE CONTROLLING STOCKHOLDER ... DIED AT THE END OF MAY WITHOUT A WILL. ... DOROTHY WALLER IS TO BE THE ADMINISTRATOR OF HIS ESTATE, BUT AS OF YET A COURT ORDER OFFICIALLY APPOINTING DOROTHY WALLER ADMINISTRATOR HAS NOT BEEN ISSUED. WHEN ... ISSUED ... THE ORDER SHALL BE FILED AS AN AMENDMENT TO THIS APPLICATION.”<sup>6</sup> Dorothy Waller signed the form as the “executrix of the estate of Dudley Waller,”<sup>7</sup> not administratrix. In contrast, the *Request* represents the stockholder died in the month June, with a will, and the principal, Dorothy Waller, is the executor of the estate.

### *Standards*

Licensees are expected to know the Commission’s rules and procedures<sup>8</sup> for paying the annual regulatory fees, filing a timely and complete petition to defer payment, and filing a request for waiver. Also, Licensees are expected to know the consequences of failing to pay an annual regulatory fee in a timely manner. After the deadline for paying the fee passes, the full amount of the regulatory fee includes the 25% late payment penalty<sup>9</sup> and, if the debt remains unpaid, the balance owed includes the accrued charges of collection, interest, and penalties.<sup>10</sup> If a regulatee tenders less than the full amount owed, it is a partial payment, which is applied to the amount owed as set forth in 47 C.F.R. § 1.1940(f)—first to the penalties and accrued charges, and then to the principal amount owed.<sup>11</sup> Afterwards, any unpaid portion is a delinquent regulatory fee that incurs interest, penalties, and charges of collection under 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940.

As set forth in 47 C.F.R. § 1.65, “[e]ach applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application ... whenever the information furnished in the pending application is no longer substantially accurate and complete

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<sup>4</sup> *Request* at 2.

<sup>5</sup> FCC 316, Application for Consent to Assign Broadcast Station Construction Permit of License or to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, File No. BTCH-20160816AAH (Aug. 15, 2016) (FCC 316).

<sup>6</sup> *Id.* at Exhibit 6.

<sup>7</sup> FCC 316, Certification.

<sup>8</sup> 47 C.F.R. § 0.406; see *Life on the Way Communications, Inc., Forfeiture Order* 30 FCC Rcd 2603, 2607 (2015).

<sup>9</sup> 47 C.F.R. § 1.1164 (“[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee of installment payment which was not paid in a timely manner.”).

<sup>10</sup> 31 U.S.C. § 3717.

<sup>11</sup> 47 C.F.R. §§ 1.1940(f) (“When a debt is paid in partial ... payments, amounts received ... shall be applied first to outstanding penalties and administrative cost charges, second to accrued interest, and third to the outstanding principal.”), 1.1157(c)(1), 1.1164(c).

in all significant respects, the applicant shall promptly as possible and in any event within 30 days ... amend the application ... so as to furnish such additional or corrected information ... .”

“The term, application, includes in addition to petitions and applications elsewhere defined in the Commission’s rules, any request, as for assistance, relief, declaratory ruling, or decision, by the Commission or on delegated authority.”<sup>12</sup> As part of the Commission’s established procedures, “[a]n application (including a petition for reconsideration or any application for review of a fee determination) ... will be examined to determine if the applicant has paid the appropriate application fee, appropriate regulatory fees, is delinquent in its debts owed the Commission, or is debarred from receiving Federal benefits (*see, e.g.*, 31 CFR 285.13; 47 CFR part 1, subpart P).”<sup>13</sup> Furthermore, “[a]pplications by any entity found not to have paid the proper application or regulatory fee will be handled pursuant to the rules set forth in 47 CFR part 1, subpart G.”<sup>14</sup> Additionally, “[a]ction will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or requests for authorization by any entity found to be delinquent in its debt to the Commission (see §1.1901(i))”<sup>15</sup> ... If a delinquency has not been paid or the debtor has not made other satisfactory arrangements within 30 days of the date of the notice provided pursuant to paragraph (b)(2) of this section, the application or request for authorization will be dismissed.”<sup>16</sup> Consistent with 47 U.S.C. § 159(c)(2) and 47 C.F.R. §§ 1.1164, 1.1166, and 1.1910, when an applicant for relief is delinquent in paying the regulatory fee, the Commission will dismiss<sup>17</sup> the request for relief and impose the statutory penalty.<sup>18</sup>

In establishing the regulatory fee program mandated by Congress,<sup>19</sup> the Commission set out the relevant schedules of the annual fees and established procedures for, among other matters, payment, waivers, reductions, and deferral, refunds, error claims, and penalties.<sup>20</sup>

The Commission’s rules at 47 C.F.R. §§ 0.401, 1.7, and 1.1166 establish the proper locations and procedures for filing waiver requests and petitioning for deferral and the consequence of dismissal for failing to comply with those rules. The Commission has designated

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<sup>12</sup> 47 C.F.R. § 1.1901(d).

<sup>13</sup> 47 C.F.R. § 1.1910(a)(1).

<sup>14</sup> 47 C.F.R. § 1.1910(b)(1).

<sup>15</sup> 47 C.F.R. § 1.1910(b)(2).

<sup>16</sup> 47 C.F.R. § 1.1910(b)(3).

<sup>17</sup> 47 U.S.C. § 159(c)(2) (“The Commission may dismiss any application or other filing for failure to pay in a timely manner any fee or penalty under this section.”); 47 C.F.R. §§ 1.1164(e) (“Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment.”); 1.1166(c) (“Waiver requests that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.”).

<sup>18</sup> 47 U.S.C. § 159; 47 C.F.R. § 1.1166; *Waivers, Reductions and Deferments of Regulatory Fees, Regulatory Fees Fact Sheet* (Sep. 5, 2013) 2013 WL 4773993 (F.C.C.) (“The Commission will dismiss any petition for waiver of a regulatory fee that does not include a payment or the required petition for deferral and supporting documentation, and under 47 U.S.C. § 159(c) and 31 U.S.C. § 3717, the Commission is required to impose the 25% penalty and other relevant charges. A request for waiver, reduction or deferral must be received before the fee due date. \* \* \* The Commission will dismiss a waiver request filed by a delinquent debtor or a petition that does not have the required financial documentation.”).

<sup>19</sup> *See* 47 C.F.R. § 1.1151.

<sup>20</sup> *See* 47 C.F.R. Part 1, Subpart G.

specific offices to receive and process certain matters, thus a request for relief is *filed* upon receipt at the location designated by the Commission.<sup>21</sup> Under section 1.1166 of the Commission's rules, a petition to waive a regulatory fee "must be accompanied by the required fee and FCC Form."<sup>22</sup> If the applicant includes the fee, the request must be submitted to the Commission's lockbox bank.<sup>23</sup> Waiver requests that do not include the required fees or form will be dismissed unless accompanied by a separate petition to defer payment due to financial hardship, supported by documentation of the financial hardship.<sup>24</sup> "If no fee payment is submitted, the request should be filed with the Commission's Secretary."<sup>25</sup> Filing is accomplished by mailing or otherwise delivering a hard copy of the documents to Office of the Secretary, Federal Communications Commission, Attention: Managing Director, Washington, D.C. 20554.

The Commission recognizes that in certain instances, payment of a regulatory fee may impose an undue financial hardship upon a licensee, and it may be waived, reduced, or deferred upon a showing of *good cause*<sup>26</sup> and a finding that the *public interest will be served thereby*.<sup>27</sup> The applicant has the burden of demonstrating relief is warranted,<sup>28</sup> *i.e.*, that special circumstances warrant a deviation from the general rule to collect the regulatory fee, and that the deviation will serve the public interest.<sup>29</sup> Under 47 C.F.R. § 1.1166,

The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. ... (a) ... All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission.

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<sup>21</sup> 47 C.F.R. §§ 0.401 ("The Commission maintains several offices and receipt locations. Applications and other filings not submitted in accordance with the addresses or locations ... will be returned to the applicant without processing."); 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission."); *Champion Communication Services, Inc., Order on Reconsideration*, 15 FCC Rcd 23782, 23783-84 (WTB 2000).

<sup>22</sup> 47 C.F.R. § 1.1166(c).

<sup>23</sup> 47 C.F.R. § 1.1166(a)(1).

<sup>24</sup> 47 C.F.R. § 1.1166(b); Assessment and Collection of Regulatory Fees For Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10819, ¶ 17 (2011) ("A regulatee's mere allegation of financial hardship thus does not automatically entitle it to a deferral of its obligation to pay regulatory fees; only a properly supported claim of financial hardship will entitle the regulatee to a deferral. Accordingly, if a request for deferral is not supported by documentation of financial hardship, it will be denied, and an associated petition for waiver or reduction will be dismissed. A regulatee cannot delay payment on the theory that its deferral request triggered an automatic six-month extension of its obligation to pay.").

<sup>25</sup> 47 C.F.R. § 1.1166(a)(2).

<sup>26</sup> 47 C.F.R. § 1.3.

<sup>27</sup> 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). *See also* Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 FCC Rcd 5333, 5344 (1994), *recon. granted in part*, 10 FCC Rcd 12759 (1995) (*1994 Report and Order*); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>28</sup> *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

<sup>29</sup> *Northeast Cellular*, 897 F.2d at 1166.

An applicant must show extraordinary and compelling circumstances that outweigh the public interest in recouping the Commission's regulatory costs.<sup>30</sup> A "sufficient showing of financial hardship"<sup>31</sup> is more than "[m]ere allegations or documentation of financial loss, standing alone. Rather, [the Commission may] grant a waiver only when the impact of the regulatory fee will affect a regulatee's ability to serve the public. It [is] incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."<sup>32</sup> The relevant financial documents include the licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of the licensee's officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information. On this information, the Commission considers on a case-by-case basis whether the licensee met the standard to show the station lacks sufficient funds to pay the regulatory fee and maintain service to the public.<sup>33</sup>

### *Discussion*

First, we dismiss the *Request* because the Commission's records show that Licensee is delinquent in paying a fee from a prior year. Hence, under 47 U.S.C. § 159(c)(2) and 47 C.F.R. §§ 1.1157, 1.1164, and 1.1910, we dismiss.

Next, we dismiss because Licensee failed to provide supporting documentation to support the asserted financial hardship. A regulatee's mere allegation of financial hardship thus does not automatically entitle it to a deferral of its obligation to pay regulatory fees; only a properly supported claim of financial hardship will entitle the regulatee to a deferral. Accordingly, if a request for deferral is not supported by documentation of financial hardship, it will be denied, and an associated petition for waiver or reduction will be dismissed. A regulatee cannot delay payment on the theory that its deferral request triggered an automatic six-month extension of its obligation to pay.<sup>34</sup>

On September 6, 2016, and several years earlier, the Commission published Procedures for Filing Waivers, Reductions and Deferrals of Regulatory Fees,<sup>35</sup> which provides,

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<sup>30</sup> 1994 *Report and Order*, 9 FCC Rcd at 5344 ¶ 29; Phoenix Broadcasting, Inc. Stations KSWD and KPFN Seward, Alaska, *Memorandum Opinion and Order*, 18 FCC Rcd 26464, 26446, ¶¶ 5-6 (2003) ("Fee relief may be granted based on asserted financial hardship, but only upon a documented showing that payment of the fee will adversely impact the licensee's ability to serve the public. ... [I]n the absence of a documented showing of insufficient funds to pay the regulatory fees, [applicant] has not made a compelling showing that overrides the public interest in the Commission's recouping the costs of its regulatory activities.").

<sup>31</sup> Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12761-62, ¶ 13 (1995) (*FY 1994 MO&O*).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10819, ¶17 (2011).

<sup>35</sup> Procedures for Filing Waivers, Reductions and Deferrals of Regulatory Fees, FCC (Sep. 6, 2016); *see also* Procedures for Filing Waivers, Reductions and Deferrals of Regulatory Fees, FCC (Sep. 14, 2015) 2015 WL 5405041 (F.C.C.), Procedures for Filing Waivers, Reductions and Deferrals of Regulatory Fees, FCC (Sep. 10,

Under 47 U.S.C. 159(d) and 47 C.F.R. § 1.1166, the Commission may waive, reduce, or defer payment of a fee in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. Licensees requesting a waiver or reduction must demonstrate both of those required elements, and licensee either must pay the full fee or submit with the request a separate petition to defer payment due to financial hardship that is fully supported by the required documentation of the financial hardship. ... The Commission will dismiss any request to waive or reduce a regulatory fee that does not include full payment or the required separate petition for deferral with supporting documentation, and under 47 U.S.C. 159(c) and 31 U.S.C. 3717, the Commission is required to impose the 25% penalty and other relevant charges. ... If the licensee does not pay the fee, but includes a petition to defer payment, licensee must file both the request and separate petition to defer payment with the Commission's Secretary, along with the required supporting financial documentation. ... Furthermore, the Commission will dismiss a waiver request filed by a delinquent debtor or a petition that does not have the required financial documentation. ...

Any request for a waiver (that must demonstrate both good cause shown and that the waiver would promote the public interest) submitted without the full fee, must include a separate petition to defer payment supported by full proper financial documentation sufficient to demonstrate both good cause shown and that the deferral of payment would promote the public interest. Both the complete request for a waiver and the complete petition to defer payment must be received by the deadline, **September 27, 2016**. **Any request for waiver and deferral received after that date will be dismissed, payment of the fee will be delinquent, the statutory 25% penalty will accrue, and licensee will be responsible for paying the full amount of the fee, including the penalty, and charges of collection, interest and additional penalties will accrue from the date of delinquency as permitted under the law. Further, the licensee will be subject to sanctions (placed in red light) and debt collection procedures.**

Notwithstanding these admonishments, Licensee submitted the *Request* without any supporting documentation. Licensee, identified as a being a separate legal entity of a corporation, leaves us to speculate on the corporation's financial abilities and all other matters asserted in the *Request*. The Commission, however, will not guess to fill gaps in information that Licensee should have provided.<sup>36</sup> As such, Licensee failed to provide adequate information from which the Commission determines whether an applicant demonstrated for a petition to defer payment of the fee *both good cause* and that the *public interest is served*.<sup>37</sup> Hence, under 47 C.F.R. §

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2014) 2014 WL 4460322 (F.C.C.), Procedures for Filing Waivers, Reductions and Deferments of Regulatory Fees, FCC (Sep. 5, 2013) 2013 WL 4773993 (F.C.C.).

<sup>36</sup>*Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 280 (D.C. Cir. 1997) ("petitioner . . . has the 'burden of clarifying its position' before the agency."); *see also* 47 C.F.R. § 1.65 (An applicant is responsible for the continuing accuracy and completeness of information furnished.).

<sup>37</sup> 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166.

1.1166,<sup>38</sup> we dismiss the submission, the fee is delinquent, the statutory 25% penalty automatically accrued,<sup>39</sup> and charges provided for at 31 U.S.C. § 3717 accrued. This resolves the matter; however, as a matter of administrative economy we looked to the submission, and for the following reasons we deny the *Request*.

A licensee has the burden of demonstrating compelling and extraordinary circumstances that a waiver and a petition for deferral would override the public interest, as determined by Congress, that the government should be reimbursed for the Commission's regulatory action.<sup>40</sup> To make a case, the licensee must "fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."<sup>41</sup> The requirement to fully document its financial position means that the licensee must present "relevant financial documents [to] include the licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of the licensee's officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information. On this information, the Commission considers on a case-by-case basis whether the licensee met the standard to show the station lacks sufficient funds to pay the regulatory fee and maintain service to the public."<sup>42</sup> Not included with or referred to in the *Request*, we nonetheless looked to Licensee's separate Notification of Suspension of Operations/Request for Silent STA, File No. BLSTA-20160810ABB (Aug. 10, 2016) for some supporting documentation. There too, Licensee failed to provide supporting documentation. Rather, Licensee asserts the station went silent on August 9, 2016, for the reason that "FOLLOWING THE RECENT DEATH OF THE LICENSEE'S CONTROLLING STOCKHOLDER THE STATION HAS EXPERIENCED BOTH FINANCIAL AND STAFFING PROBLEMS LEADING THE EXECUTOR OF THE ESTATE OF THE CONTROLLING STOCKHOLDER TO CONCLUDE THAT IT WOULD BE IN THE BEST INTEREST OF THE ESTATE TO SEEK A BUYER FOR THE STATION AND TAKE THE STATION SILENT PENDING A SALE." No financial information has been furnished;

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<sup>38</sup> 47 C.F.R. § 1.1166(c) ("Waiver requests that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship."); Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10819, ¶17 (2011) ("Accordingly, if a request for deferral is not supported by documentation of financial hardship, it will be denied, and an associated petition for waiver or reduction will be dismissed."); 47 C.F.R. § 1.1166(a) ("Requests for waivers . . . or deferrals will be acted upon by the Managing Director with the concurrence of the General Counsel. All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission.").

<sup>39</sup> 47 U.S.C. § 159(c)(1); 47 C.F.R. §§ 1.1164; Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10819, ¶17 (2011) ("Accordingly, if a request for deferral is not supported by documentation of financial hardship, it will be denied, and an associated petition for waiver or reduction will be dismissed."); Procedures for Filing Waivers, Reductions and Deferrals of Regulatory Fees, FCC (Sep. 14, 2015) 2015 WL 5405041 (F.C.C.) ("The Commission will dismiss any request to waive or reduce a regulatory fee that does not include full payment or the required separate petition for deferral with supporting documentation, and under 47 U.S.C. 159(c) and 31 U.S.C. 3717, the Commission is required to impose the 25% penalty and other relevant charges.").

<sup>40</sup> *Id.*, 1994 *Report and Order*, 9 FCC Rcd at 5344.

<sup>41</sup> *Id.*

<sup>42</sup> 1994 *MO&O*, 10 FCC Rcd at 12761-62, ¶ 13.

however, separate public information suggests that Licensee's staffing problems arose because Licensee locked out its employees rather abruptly on August 1, 2016.<sup>43</sup>

Rather than meet the elements of that standard, Licensee offered an unsupported assertion of "poor financial condition." This does not meet the Commission's standard that the applicant must "fully document its financial position and show that it lacks sufficient funds to pay the regulatory fees and to maintain service to the public."<sup>44</sup> Furthermore, Licensee fails to establish for the petition to defer payment both *good cause* and that the *public interest is served* in deferring payment.

Simply, Licensee's information does not show compelling and extraordinary circumstances that outweigh the public interest in recouping the Commission's regulatory costs on the date due. Hence, in the alternative, we deny the *Request*.<sup>45</sup>

Payment of the delinquent FY 2016 regulatory fee is due immediately. This is a demand for payment of a delinquent debt that includes the FY 2016 regulatory fee, the statutory 25% penalty,<sup>46</sup> and charges provided for under 31 U.S.C. § 3717.

Licensee is delinquent in paying a debt owed the United States. This demand letter provides notification that under 31 U.S.C. § 3711(g), without further notice, and usually within 120 days or less of the date of delinquency, we will transfer the delinquent debt to Treasury, which will initiate collection action through private collection activities and assess additional charges. In addition, we may refer the debt to the Department of Justice, which may result in litigation and additional costs. Moreover, under 31 U.S.C. § 3716, 31 C.F.R. § 285.5, and 47 C.F.R. § 1.1912, some or all of the debt may be collected by non-centralized or centralized administrative offset. Also, under 31 U.S.C. § 3711(e), this debt and Licensee's payment history will be reported to credit reporting information bureaus. Because we have furnished notice here, Licensee may not receive another notification of this process. Finally, Licensee is red lighted<sup>47</sup> until it pays all delinquent debts or it makes other satisfactory arrangements.<sup>48</sup>

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<sup>43</sup> See <http://www.easttexasmatters.com/news/local-news/staff-all-breeze-radio-station-employees-let-go-without-notice>. By Michael Wesp|mwesp@ketknbc.com Published 08/01 2016 09:27PM.

<sup>44</sup> 1994 MO&O, 10 FCC Rcd at 12762, ¶ 13.

<sup>45</sup> Phoenix Broadcasting, Inc. Stations KSWD and KPFN Seward, Alaska, *Memorandum Opinion and Order*, 18 FCC Rcd 26464, 26446, ¶¶ 5-6 (2003).

<sup>46</sup> 47 U.S.C. § 159(c)(1).

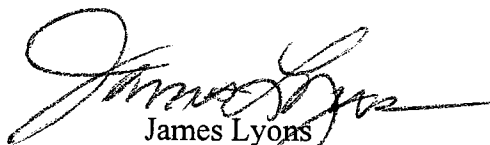
<sup>47</sup> See 47 C.F.R. § 1.1910(b)(2) ("Action will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or request for authorization by any entity found to be delinquent in its debt to the Commission ..."); 47 C.F.R. § 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment.").

<sup>48</sup> See 47 C.F.R. § 1.1914 ("If a debtor is financially unable to pay a debt in one lump sum, the Commission, in its sole discretion, may accept payment in regular installments.").



If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read "James Lyons", with a stylized, flowing script.

James Lyons  
Acting Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

DEC 8 2016

OFFICE OF  
MANAGING DIRECTOR

David Tillotson, Esq.  
4606 Charleston Terrace, N.W.  
Washington, DC 20007

Licensee/Applicant: **Waller Media, LLC**  
Deferral of Regulatory Fees, Financial Hardship  
Disposition: **Dismissed and Denied** (47 U.S.C. §  
159; 47 C.F.R. §§ 1.65, 1.1157, 1.1164, 1.1166, and  
1.1910)  
Station(s): KFRO-FM, KZXM, and KMPA  
Fee: Fiscal Year (FY) 2016 Regulatory Fees  
Date Request Submitted: Sep. 12, 2016  
Date Regulatory Fee Paid: Not paid  
Fee Control No.: RROG 16-00016208  
Amount Due: *See Fee Filer and Contact the  
Bureau of the Fiscal Service, U.S. Treasury*

Dear Counsel:

This responds to Licensee's *Request*<sup>1</sup> for a 120-day deferral of payment of the required Fiscal Year (FY) 2016 regulatory fees due for Stations KFRO-FM, KZXM, and KMPA. As we discuss below, we dismiss because Licensee is delinquent in paying a prior year required annual regulatory fee<sup>2</sup> and, in the alternative, because Licensee failed to include the necessary financial documentation to support a petition to defer payment based on financial hardship. Furthermore, we deny the *Request* because Licensee failed to demonstrate good cause and that the public interest will be served. Because we dismiss and deny the petition for deferral, effective September 27, 2016, the unpaid FY 2016 regulatory fees were delinquent; accordingly, we assessed the statutory penalty of 25% of the unpaid amounts, and debt collection charges required by 31 U.S.C. § 3717. This is a demand for payment and notification that Licensee remains redlighted.

*Background*

On September 12, 2016, we received Licensee's *Request*, which in relevant part "request[ed] pursuant to Section 1.116 (sic) of the Commission's rules a 120 day deferral of its obligation to pay FY 2016 annual regulatory fees."<sup>3</sup> Licensee asserted, its "President and Managing Member of Waller Media ... died this past June ... the Executrix ... found the

<sup>1</sup> Waller Media, LLC, Request for Deferral of FY 2016 Regulatory Fees for Stations Listed in Exhibit A, Request for Deferral of FY 2016 Regulatory Fees (Sep. 7, 2016, *rec'd* Sep. 12, 2016) (*Request*).

<sup>2</sup> The Commission's records show that Waller Media, LLC is delinquent in paying a portion of one or more regulatory fees.

<sup>3</sup> *Request*.

Stations to be in such poor financial condition that [Licensee] was forced to [go] off the air ... [a]t the present time, [Licensee] does not have the cash available ... to pay the ... Fees or ... means to raise the needed cash ... the Executrix has entered into a letter of intent for such a sale ... expect[ed] to be ... complete[d] before the end of [2016], at which time [Licensee] will be able to pay the ... Fees.”<sup>45</sup> Licensee did not include supporting documentation, *e.g.*, a copy of the letter of intent, notification of silent status, or financial documentation. We note that Licensee’s separate application to transfer control<sup>6</sup> includes some information inconsistent with the representations in the *Request*. For example, the FCC 316 includes the statement, “THE CONTROLLING MEMBER OF WALLER MEDIA, LLC. DUDLEY WALLER, DIED AT THE END OF MAY WITHOUT A WILL. ... DOROTHY WALLER IS TO BE THE ADMINISTRATOR OF HIS ESTATE, BUT AS OF YET A COURT ORDER OFFICIALLY APPOINTING DOROTHY WALLER ADMINISTRATOR HAS NOT BEEN ISSUED. WHEN ... ISSUED ... THE ORDER SHALL BE FILED AS AN AMENDMENT TO THIS APPLICATION.”<sup>7</sup> In contrast, the *Request* represents the member died in the month June, with a will, and the principal, Dorothy Waller, is the executor of the estate.

### *Standards*

Licenses are expected to know the Commission’s rules and procedures<sup>8</sup> for paying the annual regulatory fees, filing a timely and complete petition to defer payment, and filing a request for waiver. Also, Licensees are expected to know the consequences of failing to pay an annual regulatory fee in a timely manner. After the deadline for paying the fee passes, the full amount of the regulatory fee includes the 25% late payment penalty<sup>9</sup> and, if the debt remains unpaid, the balance owed includes the accrued charges of collection, interest, and penalties.<sup>10</sup> If a regulatee tenders less than the full amount owed, it is a partial payment, which is applied to the amount owed as set forth in 47 C.F.R. § 1.1940(f)—first to the penalties and accrued charges, and then to the principal amount owed.<sup>11</sup> Afterwards, any unpaid portion is a delinquent regulatory fee that incurs interest, penalties, and charges of collection under 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940.

As set forth in 47 C.F.R. § 1.65, “[e]ach applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application ... whenever the information furnished in the pending application is no longer substantially accurate and complete

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<sup>4</sup> *Id.* at 1-2.

<sup>5</sup> *Request*.

<sup>6</sup> FCC 316, Application for Consent to Assign Broadcast Station Construction Permit of License or to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, File No. BTCH-20160815AAQ (Aug. 15, 2016) (*FCC 316*). Licensee identified itself in this application by the name, “Waller Broadcasting, Inc.”

<sup>7</sup> FCC 316.

<sup>8</sup> 47 C.F.R. § 0.406; *see* Life on the Way Communications, Inc., *Forfeiture Order* 30 FCC Rcd 2603, 2607 (2015).

<sup>9</sup> 47 C.F.R. § 1.1164 (“[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee of installment payment which was not paid in a timely manner.”).

<sup>10</sup> 31 U.S.C. § 3717.

<sup>11</sup> 47 C.F.R. §§ 1.1940(f) (“When a debt is paid in partial ... payments, amounts received ... shall be applied first to outstanding penalties and administrative cost charges, second to accrued interest, and third to the outstanding principal.”), 1.1157(c)(1), 1.1164(c).

in all significant respects, the applicant shall promptly as possible and in any event within 30 days ... amend the application ... so as to furnish such additional or corrected information ... .”

“The term, application, includes in addition to petitions and applications elsewhere defined in the Commission’s rules, any request, as for assistance, relief, declaratory ruling, or decision, by the Commission or on delegated authority.”<sup>12</sup> As part of the Commission’s established procedures, “[a]n application (including a petition for reconsideration or any application for review of a fee determination) ... will be examined to determine if the applicant has paid the appropriate application fee, appropriate regulatory fees, is delinquent in its debts owed the Commission, or is debarred from receiving Federal benefits (*see, e.g.*, 31 CFR 285.13; 47 CFR part 1, subpart P).”<sup>13</sup> Furthermore, “[a]pplications by any entity found not to have paid the proper application or regulatory fee will be handled pursuant to the rules set forth in 47 CFR part 1, subpart G.”<sup>14</sup> Additionally, “[a]ction will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or requests for authorization by any entity found to be delinquent in its debt to the Commission (*see* §1.1901(i))<sup>15</sup> ... If a delinquency has not been paid or the debtor has not made other satisfactory arrangements within 30 days of the date of the notice provided pursuant to paragraph (b)(2) of this section, the application or request for authorization will be dismissed.”<sup>16</sup> Consistent with 47 U.S.C. § 159(c)(2) and 47 C.F.R. §§ 1.1164, 1.1166, and 1.1910, when an applicant for relief is delinquent in paying the regulatory fee, the Commission will dismiss<sup>17</sup> the request for relief and impose the statutory penalty.<sup>18</sup>

In establishing the regulatory fee program mandated by Congress,<sup>19</sup> the Commission set out the relevant schedules of the annual fees and established procedures for, among other matters, payment, waivers, reductions, and deferral, refunds, error claims, and penalties.<sup>20</sup>

The Commission’s rules at 47 C.F.R. §§ 0.401, 1.7, and 1.1166 establish the proper locations and procedures for filing waiver requests and petitioning for deferral and the consequence of dismissal for failing to comply with those rules. The Commission has designated

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<sup>12</sup> 47 C.F.R. § 1.1901(d).

<sup>13</sup> 47 C.F.R. § 1.1910(a)(1).

<sup>14</sup> 47 C.F.R. § 1.1910(b)(1).

<sup>15</sup> 47 C.F.R. § 1.1910(b)(2).

<sup>16</sup> 47 C.F.R. § 1.1910(b)(3).

<sup>17</sup> 47 U.S.C. § 159(c)(2) (“The Commission may dismiss any application or other filing for failure to pay in a timely manner any fee or penalty under this section.”); 47 C.F.R. §§ 1.1164(e) (“Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment.”); 1.1166(c) (“Waiver requests that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.”).

<sup>18</sup> 47 U.S.C. § 159; 47 C.F.R. § 1.1166; *Waivers, Reductions and Deferments of Regulatory Fees, Regulatory Fees Fact Sheet* (Sep. 5, 2013) 2013 WL 4773993 (F.C.C.) (“The Commission will dismiss any petition for waiver of a regulatory fee that does not include a payment or the required petition for deferral and supporting documentation, and under 47 U.S.C. § 159(c) and 31 U.S.C. § 3717, the Commission is required to impose the 25% penalty and other relevant charges. A request for waiver, reduction or deferral must be received before the fee due date. \* \* \* The Commission will dismiss a waiver request filed by a delinquent debtor or a petition that does not have the required financial documentation.”).

<sup>19</sup> *See* 47 C.F.R. § 1.1151.

<sup>20</sup> *See* 47 C.F.R. Part 1, Subpart G.

specific offices to receive and process certain matters, thus a request for relief is *filed* upon receipt at the location designated by the Commission.<sup>21</sup> Under section 1.1166 of the Commission's rules, a petition to waive a regulatory fee "must be accompanied by the required fee and FCC Form."<sup>22</sup> If the applicant includes the fee, the request must be submitted to the Commission's lockbox bank.<sup>23</sup> Waiver requests that do not include the required fees or form will be dismissed unless accompanied by a separate petition to defer payment due to financial hardship, supported by documentation of the financial hardship.<sup>24</sup> "If no fee payment is submitted, the request should be filed with the Commission's Secretary."<sup>25</sup> Filing is accomplished by mailing or otherwise delivering a hard copy of the documents to Office of the Secretary, Federal Communications Commission, Attention: Managing Director, Washington, D.C. 20554.

The Commission recognizes that in certain instances, payment of a regulatory fee may impose an undue financial hardship upon a licensee, and it may be waived, reduced, or deferred upon a showing of *good cause*<sup>26</sup> and a finding that the *public interest will be served thereby*.<sup>27</sup> The applicant has the burden of demonstrating relief is warranted,<sup>28</sup> *i.e.*, that special circumstances warrant a deviation from the general rule to collect the regulatory fee, and that the deviation will serve the public interest.<sup>29</sup> Under 47 C.F.R. § 1.1166,

The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. ... (a) ... All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission.

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<sup>21</sup> 47 C.F.R. §§ 0.401 ("The Commission maintains several offices and receipt locations. Applications and other filings not submitted in accordance with the addresses or locations ... will be returned to the applicant without processing."); 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission."); *Champion Communication Services, Inc., Order on Reconsideration*, 15 FCC Rcd 23782, 23783-84 (WTB 2000).

<sup>22</sup> 47 C.F.R. § 1.1166(c).

<sup>23</sup> 47 C.F.R. § 1.1166(a)(1).

<sup>24</sup> 47 C.F.R. § 1.1166(b); *Assessment and Collection of Regulatory Fees For Fiscal Year 2011, Report and Order*, 26 FCC Rcd 10812, 10819, ¶ 17 (2011) ("A regulatee's mere allegation of financial hardship thus does not automatically entitle it to a deferral of its obligation to pay regulatory fees; only a properly supported claim of financial hardship will entitle the regulatee to a deferral. Accordingly, if a request for deferral is not supported by documentation of financial hardship, it will be denied, and an associated petition for waiver or reduction will be dismissed. A regulatee cannot delay payment on the theory that its deferral request triggered an automatic six-month extension of its obligation to pay.").

<sup>25</sup> 47 C.F.R. § 1.1166(a)(2).

<sup>26</sup> 47 C.F.R. § 1.3.

<sup>27</sup> 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). *See also* *Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Report and Order*, 9 FCC Rcd 5333, 5344 (1994), *recon. granted in part*, 10 FCC Rcd 12759 (1995) (1994 *Report and Order*); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>28</sup> *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

<sup>29</sup> *Northeast Cellular*, 897 F.2d at 1166.

An applicant must show extraordinary and compelling circumstances that outweigh the public interest in recouping the Commission's regulatory costs.<sup>30</sup> A "sufficient showing of financial hardship"<sup>31</sup> is more than "[m]ere allegations or documentation of financial loss, standing alone. Rather, [the Commission may] grant a waiver only when the impact of the regulatory fee will affect a regulatee's ability to serve the public. It [is] incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."<sup>32</sup> The relevant financial documents include the licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of the licensee's officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information. On this information, the Commission considers on a case-by-case basis whether the licensee met the standard to show the station lacks sufficient funds to pay the regulatory fee and maintain service to the public.<sup>33</sup>

### *Discussion*

First, under 47 U.S.C. § 159(c)(2) and 47 C.F.R. §§ 1.1157, 1.1164, and 1.1910, we dismiss the *Request* because the Commission's records show that Licensee is delinquent in paying a fee from a prior year.

Next, we dismiss because Licensee failed to provide supporting documentation to support the asserted financial hardship. A regulatee's mere allegation of financial hardship thus does not automatically entitle it to a deferral of its obligation to pay regulatory fees; only a properly supported claim of financial hardship will entitle the regulatee to a deferral. Accordingly, if a request for deferral is not supported by documentation of financial hardship, it will be denied, and an associated petition for waiver or reduction will be dismissed. A regulatee cannot delay payment on the theory that its deferral request triggered an automatic six-month extension of its obligation to pay.<sup>34</sup>

On September 6, 2016, and several years earlier, the Commission published Procedures for Filing Waivers, Reductions and Deferments of Regulatory Fees,<sup>35</sup> which provides,

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<sup>30</sup> 1994 Report and Order, 9 FCC Rcd at 5344 ¶ 29; Phoenix Broadcasting, Inc. Stations KSWD and KPFN Seward, Alaska, *Memorandum Opinion and Order*, 18 FCC Rcd 26464, 26446, ¶¶ 5-6 (2003) ("Fee relief may be granted based on asserted financial hardship, but only upon a documented showing that payment of the fee will adversely impact the licensee's ability to serve the public. ... [I]n the absence of a documented showing of insufficient funds to pay the regulatory fees, [applicant] has not made a compelling showing that overrides the public interest in the Commission's recouping the costs of its regulatory activities.").

<sup>31</sup> Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12761-62, ¶ 13 (1995) (*FY 1994 MO&O*).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10819, ¶17 (2011).

<sup>35</sup> Procedures for Filing Waivers, Reductions and Deferments of Regulatory Fees, FCC (Sep. 6, 2016); *see also* Procedures for Filing Waivers, Reductions and Deferments of Regulatory Fees, FCC (Sep. 14, 2015) WL 5405041 (F.C.C.), Procedures for Filing Waivers, Reductions and Deferments of Regulatory Fees, FCC (Sep. 10,

Under 47 U.S.C. 159(d) and 47 C.F.R. § 1.1166, the Commission may waive, reduce, or defer payment of a fee in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. Licensees requesting a waiver or reduction must demonstrate both of those required elements, and licensee either must pay the full fee or submit with the request a separate petition to defer payment due to financial hardship that is fully supported by the required documentation of the financial hardship. ... The Commission will dismiss any request to waive or reduce a regulatory fee that does not include full payment or the required separate petition for deferral with supporting documentation, and under 47 U.S.C. 159(c) and 31 U.S.C. 3717, the Commission is required to impose the 25% penalty and other relevant charges. ... If the licensee does not pay the fee, but includes a petition to defer payment, licensee must file both the request and separate petition to defer payment with the Commission's Secretary, along with the required supporting financial documentation. ... Furthermore, the Commission will dismiss a waiver request filed by a delinquent debtor or a petition that does not have the required financial documentation. ...

Any request for a waiver (that must demonstrate both good cause shown and that the waiver would promote the public interest) submitted without the full fee, must include a separate petition to defer payment supported by full proper financial documentation sufficient to demonstrate both good cause shown and that the deferral of payment would promote the public interest. Both the complete request for a waiver and the complete petition to defer payment must be received by the deadline, **September 27, 2016**. **Any request for waiver and deferral received after that date will be dismissed, payment of the fee will be delinquent, the statutory 25% penalty will accrue, and licensee will be responsible for paying the full amount of the fee, including the penalty, and charges of collection, interest and additional penalties will accrue from the date of delinquency as permitted under the law. Further, the licensee will be subject to sanctions (placed in red light) and debt collection procedures.**

Notwithstanding these admonishments, Licensee submitted the *Request* without any supporting documentation. Licensee, identified as a being a separate legal entity of a limited liability company, leaves us to speculate on the company's financial abilities and all other matters asserted in the *Request*. The Commission, however, will not guess to fill gaps in information that Licensee should have provided.<sup>36</sup> As such, Licensee failed to provide adequate information from which the Commission determines whether an applicant demonstrated for a petition to defer payment of the fee *both good cause* and that the *public interest is served*.<sup>37</sup>

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2014) 2014 WL 4460322 (F.C.C.), Procedures for Filing Waivers, Reductions and Deferments of Regulatory Fees, FCC (Sep. 5, 2013) 2013 WL 4773993 (F.C.C.).

<sup>36</sup>*Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 280 (D.C. Cir. 1997) ("petitioner . . . has the 'burden of clarifying its position' before the agency."); see also 47 C.F.R. § 1.65 (An applicant is responsible for the continuing accuracy and completeness of information furnished.).

<sup>37</sup> 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166.

Hence, under 47 C.F.R. § 1.1166,<sup>38</sup> we dismiss the submission, the fee is delinquent, the statutory 25% penalty automatically accrued,<sup>39</sup> and charges provided for at 31 U.S.C. § 3717 accrued. This resolves the matter; however, as a matter of administrative economy we looked to the submission, and for the following reasons we deny the *Request*.

A licensee has the burden of demonstrating compelling and extraordinary circumstances that a waiver and a petition for deferral would override the public interest, as determined by Congress, that the government should be reimbursed for the Commission's regulatory action.<sup>40</sup> To make a case, the licensee must "fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."<sup>41</sup> The requirement to fully document its financial position means that the licensee must present "relevant financial documents [to] include the licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of the licensee's officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information. On this information, the Commission considers on a case-by-case basis whether the licensee met the standard to show the station lacks sufficient funds to pay the regulatory fee and maintain service to the public."<sup>42</sup> Not included with or referred to in the *Request*, we nonetheless looked to one of Licensee's separate Notifications of Suspension of Operations/Request for Silent STA,<sup>43</sup> File No. BLSTA-20160810ABM (Aug. 10, 2016) for some supporting documentation. We note, Licensee identified the legal name of the Licensee as "Waller Broadcasting, Inc." with FRN 0004338331. Even so, Licensee failed to provide supporting documentation. Rather, Licensee asserts the station went silent on August 9, 2016, for the reason that "FOLLOWING THE RECENT DEATH OF THE LICENSEE'S CONTROLLING MEMBER (THE) STATION HAS EXPERIENCED BOTH FINANCIAL AND STAFFING PROBLEMS LEADING THE EXECUTOR OF THE ESTATE OF THE CONTROLLING MEMBER TO CONCLUDE THAT IT WOULD BE IN THE BEST INTEREST OF THE ESTATE TO SEEK A BUYER FOR THE STATION AND TAKE THE

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<sup>38</sup> 47 C.F.R. § 1.1166(c) ("Waiver requests that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship."); Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10819, ¶17 (2011) ("Accordingly, if a request for deferral is not supported by documentation of financial hardship, it will be denied, and an associated petition for waiver or reduction will be dismissed."); 47 C.F.R. § 1.1166(a) ("Requests for waivers ... or deferrals will be acted upon by the Managing Director with the concurrence of the General Counsel. All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission.").

<sup>39</sup> 47 U.S.C. § 159(c)(1); 47 C.F.R. §§ 1.1164; Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812, 10819, ¶17 (2011) ("Accordingly, if a request for deferral is not supported by documentation of financial hardship, it will be denied, and an associated petition for waiver or reduction will be dismissed."); Procedures for Filing Waivers, Reductions and Deferments of Regulatory Fees, FCC (Sep. 14, 2015) 2015 WL 5405041 (F.C.C.) ("The Commission will dismiss any request to waive or reduce a regulatory fee that does not include full payment or the required separate petition for deferral with supporting documentation, and under 47 U.S.C. 159(c) and 31 U.S.C. 3717, the Commission is required to impose the 25% penalty and other relevant charges.").

<sup>40</sup> *Id.*, 1994 *Report and Order*, 9 FCC Rcd at 5344.

<sup>41</sup> *Id.*

<sup>42</sup> 1994 *MO&O*, 10 FCC Rcd at 12761-62, ¶ 13.

<sup>43</sup> We need not include a discussion of filings pertaining to all three stations.



STATION SILENT PENDING A SALE.” No financial information has been furnished; however, separate public information suggests that Licensee’s staffing problems arose because Licensee locked out its employees rather abruptly on August 1, 2016.<sup>44</sup>

Rather than meet the elements of that standard, Licensee offered an unsupported assertion of “poor financial condition.” This does not meet the Commission’s standard that the applicant must “fully document its financial position and show that it lacks sufficient funds to pay the regulatory fees and to maintain service to the public.”<sup>45</sup> Furthermore, Licensee fails to establish for the petition to defer payment both *good cause* and that the *public interest is served* in deferring payment.

Simply, Licensee’s information does not show compelling and extraordinary circumstances that outweigh the public interest in recouping the Commission’s regulatory costs on the date due. Hence, in the alternative, we deny the *Request*.<sup>46</sup>

Payment of the delinquent FY 2016 regulatory fee is due immediately. This is a demand for payment of a delinquent debt that includes the FY 2016 regulatory fee, the statutory 25% penalty,<sup>47</sup> and charges provided for under 31 U.S.C. § 3717.

Licensee is delinquent in paying a debt owed the United States. This demand letter provides notification that under 31 U.S.C. § 3711(g), without further notice, and usually within 120 days or less of the date of delinquency, we will transfer the delinquent debt to Treasury, which will initiate collection action through private collection activities and assess additional charges. In addition, we may refer the debt to the Department of Justice, which may result in litigation and additional costs. Moreover, under 31 U.S.C. § 3716, 31 C.F.R. § 285.5, and 47 C.F.R. § 1.1912, some or all of the debt may be collected by non-centralized or centralized administrative offset. Also, under 31 U.S.C. § 3711(e), this debt and Licensee’s payment history will be reported to credit reporting information bureaus. Because we have furnished notice here, Licensee may not receive another notification of this process. Finally, Licensee is red lighted<sup>48</sup> until it pays all delinquent debts or it makes other satisfactory arrangements.<sup>49</sup>

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<sup>44</sup> See <http://www.easttexasmatters.com/news/local-news/staff-all-breeze-radio-station-employees-let-go-without-notice>. By Michael Wesp |mwesp@ketknbc.com Published 08/01 2016 09:27PM.

<sup>45</sup> 1994 MO&O, 10 FCC Rcd at 12762, ¶ 13.

<sup>46</sup> Phoenix Broadcasting, Inc. Stations KSWD and KPFN Seward, Alaska, *Memorandum Opinion and Order*, 18 FCC Rcd 26464, 26446, ¶¶ 5-6 (2003).


<sup>47</sup> 47 U.S.C. § 159(c)(1).

<sup>48</sup> See 47 C.F.R. § 1.1910(b)(2) (“Action will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or request for authorization by any entity found to be delinquent in its debt to the Commission ... .”); 47 C.F.R. § 1.1164(e) (“Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment.”).

<sup>49</sup> See 47 C.F.R. § 1.1914 (“If a debtor is financially unable to pay a debt in one lump sum, the Commission, in its sole discretion, may accept payment in regular installments.”).

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,



James Lyons  
Acting Chief Financial Officer

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 09 2017

OFFICE OF  
MANAGING DIRECTOR

Marty Kluh, Manager  
Regulatory Affairs  
JSI  
7852 Walker Drive, Suite 200  
Greenbelt, MD 20770

Licensee/Applicant/Regulatee: **Yadkin Valley Telephone  
Membership Corporation**

Exemption: Government Entity or Nonprofit

Disposition: **Denied** (47 U.S.C. § 159; 47 C.F.R. §§ 0.401,  
1.7, 1.65, 1.1159, 1.1160, and 1.1162)

Fee(s): Annual Regulatory Fee(s)

Fee Control No. RROG-15-00016034

Dear Mr. Kluh:

This responds to Licensee's *Request*<sup>1</sup> that we change its status to exempt from regulatory fee payments. The *Request* was filed before the fee was due; however, as is indicated in the Commission's records, Licensee paid the fee, but did not file a proper supplemental request for a refund<sup>2</sup> as set forth at 47 C.F.R. § 1.1160,<sup>3</sup> accordingly we do not have a refund issue before us. As to the substance of the *Request*, as we discuss below, we deny the requested relief because Licensee failed to establish it is exempt from paying regulatory fees.

*Background*

On September 18, 2015, Licensee filed its *Request* asserting, Licensee "is a North Carolina telephone membership corporation which is tax-exempt as a subdivision of the State of North Carolina and deemed a state institution. [Licensee] is accordingly exempt from ... Commission regulatory fees and provides the attached [1971 IRS Letter] to document its exempt status."<sup>4</sup>

<sup>1</sup> Letter from Marty Kluh, Manager, Regulatory Affairs, JSI, 7852 Walker Drive, Suite 200, Greenbelt, MD 20770 to Marlene H. Dortch, Secretary, FCC, 445 Twelfth Street, S.W., Washington, DC 205554 (sic), Attn: Managing Director (Sep. 18, 2015) (*Request*) with (a) Letter from Internal Revenue Service, P.O. Box 737, Atlanta, GA 30301 to W.H. Turlington & Co., c/o W.H. Turlington, CPA, Century Bldg., 113 West Center St., Lexington, NC 27292 (May 7, 1971) (1971 IRS Letter) and (b) extract pages from CCH with page headings, "Exempt Organizations-- §501 [§3001]" and "Income of States, Etc.-- § 115" (*CCH Extracts*).

<sup>2</sup> 47 C.F.R. §§ 0.401, 1.7.

<sup>3</sup> 47 C.F.R. § 1.1160 ("(a) Regulatory fees will be refunded, upon request, only in the following instances: (1) When no regulatory fee is required or an excessive fee has been paid. In the case of an overpayment, the refund amount will be based on the applicants', permittees', or licensees' entire submission.").

<sup>4</sup> *Request*.

Licensee did not include reference to or explanation of relevant North Carolina statutes pertaining to membership corporations or cooperative telecommunications entities, or any other legal authority or relevant documentation pertaining to the procedures and legal authority establishing Licensee.

### *Standards*

Our rule at 47 C.F.R. §1.1162 provides general exemptions from regulatory fees. Related to Licensee's *Petition*, our rule provides,

[n]o regulatory fee established in §§1.1152 through 1.1156, unless otherwise qualified herein, shall be required for ... (b) Applicants, permittees, or licensees who qualify as government entities. For purposes of this exemption, a government entity is defined as any state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs. (c) Applicants and permittees who qualify as nonprofit entities. For purposes of this exemption, a nonprofit entity is defined as: an organization duly qualified as a nonprofit, tax exempt entity under section 501 of the Internal Revenue Code, 26 U.S.C. 501; or an entity with current certification as a nonprofit corporation or other nonprofit entity by state or other governmental authority.

Requests for refunds are governed by our rule at 47 C.F.R. § 1.1160.

### *Discussion*

First, we look to whether the matter is properly before us, and find Licensee fails to specify the nature of the claimed exemption. Instead, Licensee states generally it is "tax exempt as a subdivision of the State of North Carolina and [it is] a state institution." We will not speculate to fill in the gaps of the basis for the claimed exemption, *e.g.*, a government entity or a nonprofit, and if a nonprofit, we note Licensee fails to provide "written documentation establishing the basis for its exemption"<sup>5</sup> as a non-profit as is required by Section 1.1162(c). Licensee submitted only the *1971 IRS Letter* and two pages of the *CCH Extracts*. The *1971 IRS Letter*, addressed to W.H. Turlington & Company, states only that "North Carolina telephone membership corporations are not required to file Form 990 inasmuch as they are subdivisions of the State of North Carolina."<sup>6</sup> The *CCH Extracts* refer to entities that are not required to file an annual information return on Form 990, such as a church, certain religious activities, a certain state institution, certain organizations established by an Act of Congress, certain private foundations, and certain trusts.

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<sup>5</sup> 47 C.F.R. § 1.1162(c)(1) & (2).

<sup>6</sup> *1971 IRS Letter*.

The problems here are of relevance and proof. First, Licensee fails to establish that it is a corporation properly registered and authorized by the State of North Carolina and with the category or classification described in the *Request*, i.e., membership or utility corporation. Next, Licensee fails to establish that it is a "state, possession, city, county, town, village, municipal corporation, or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs."<sup>7</sup> In the alternative, Licensee fails to establish its nonprofit status.

Our determination whether Licensee or any applicant for an exemption is within the meaning of 47 C.F.R. § 1.1162(b) includes analysis of the nature and status of the entity and of the function the entity provides, i.e., is it a governmental entity and are its functions the exercise of sovereign direction and control. If the entity is not a government entity and it is not engaged in a government function, it does not qualify for an exemption.

To be clear, Licensee fails to establish each of the necessary three prongs of our rule: that Licensee is a governmental entity, controlled by publicly elected or duly appointed public officials who exercise sovereign direction and control over the program.

First, Licensee failed to establish that it is a city, town or municipal corporation, or similar political organization or subpart thereof. Neither the *1971 IRS Letter* nor the *CCH Extracts* establish Licensee is a governmental activity conducting governmental functions. Rather, it evidences only that in 1971, the Internal Revenue Service notified W.H. Turlington that the "North Carolina telephone membership corporations are not required to file Form 990 [because] they are subdivisions of the State of North Carolina." Licensee has not shown the relevance of this 46 year old letter to the *Request*. The two exhibits do not show that Licensee is a city, town or municipal corporation, or similar organization or subpart thereof providing a governmental function.

Next, the Licensee fails to establish for our analysis that its leadership is, as required by our rule, "publicly elected or duly appointed public officials." Plainly, Licensee fails to provide any evidence showing the composition of the board of directors or the corporate officers or the status of the employees (e.g., whether the employees are employees of the state).

Finally, Licensee fails to establish it is a municipal corporation instituted for public purposes,<sup>8</sup> and exercising governmental functions under proper authority, rather than proprietary functions.<sup>9</sup> For example, a governmental function (in relation to our rule mandating the exercise of sovereign direction and control) is the performance of a public service for the general welfare of the inhabitants or the community, in which the municipal corporation has no private interest and for which it derives no special benefit or advantage. Conversely, a municipality (or its subpart) acting beyond the scope of ordinary governmental functions, such that it is engaging in

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<sup>7</sup> 47 C.F.R. § 1.1162.

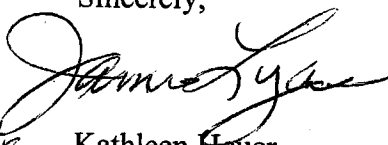
<sup>8</sup> See *Mayor and Recorder of City of Nashville v. Ray*, 86 U.S. 468, 475 (1873).

<sup>9</sup> *Owen v. City of Independence*, 445 U.S. 622, 645 (1980); see *GTE Northwest Inc. v. Oregon PUC*, 39 P.3d 201, 208 (Ct. App. Or. 2002) (A city generally may exercise authority only within its corporate limits. A municipality acting in its governmental or proprietary capacity can do so only by virtue of express or implied authority conferred upon it.), see also *Miller Grocery Co. v. City of Des Moines*, 192 N.W. 302 (S.C. Iowa 1923).

ministerial or private activities, or services for a profit, is treated as a private corporation.<sup>10</sup> Here, Licensee has not established itself to be a municipality or subpart thereof, and it has not established whether it has a private interest in and it derives benefits and advantages from its business activity. In the alternative, Licensee fails to show that it is a nonprofit entity. Accordingly, we deny the *Request*.

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,

  
For: Kathleen Heuer  
Chief Financial Officer

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<sup>10</sup> *AGI Associates, LLC v. City of Hickory*, 773 F.3d 576, 579 (4th Cir. 2014). See e.g., *Springfield Utility Bd. v. Emerald People's Utility Dist.*, 84 P.3d 167, 174 (Ct. App. Or. 2004)(Discussion of people's utility district being a municipal corporation and the resulting design to carry out governmental functions.).